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Chairman:	Mr. AFONSO	(Mozambique)
later:	Mr. SANDOVAL (Vice-Chairman)	(Ecuador)
later:	Mr. NEDELCHEV	(Bulgaria)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Mr. CASTILLO (Venezuela), referring to the draft articles on the non-navigational uses of international watercourses, said his delegation found that article 2, on the use of terms, realistically reflected the hydrological situation, and welcomed the inclusion of groundwater in the definition of an international watercourse. However, the text would be yet clearer if the word "groundwater" were modified by the adjective "free".

2. In article 10, the principle that no use of an international watercourse enjoyed inherent priority over other uses was clearly established in paragraph 1, and the article was vital to the draft; however, it might be more appropriate to specify in paragraph 1 who would be the parties to any agreement to the contrary. His delegation considered that the term 'pacta', in the Spanish version of the article, should be broadly construed, or preferably, replaced by the word 'acuerdo', which was wider in scope.

3. It was essential for States to cooperate in the management of watercourses, as provided in articles 26 and 27. Consultations on cooperation could result from an initiative taken by only one of the watercourse States. Such initiatives had led to bilateral consultations, resulting in the creation of joint commissions by Venezuela and neighbouring countries with which it shared watercourses and a concern for their use.

4. Inter-State cooperation on the regulation of the flow of the waters of an international watercourse was absolutely necessary. His delegation therefore fully subscribed to the principle set out in article 27, paragraph 2, namely that watercourse States should participate on an equitable basis in the construction and maintenance or defrayal of the costs of regulation works. The provision in article 28 to the effect that watercourse States should employ their best efforts to protect installations within their territories was also acceptable to his delegation; that obligation and the consultations mandated in paragraph 2 of the article were important in regulating international watercourses.

5. The draft articles should be adopted at a conference of plenipotentiaries, which should be preceded, if necessary, by the establishment of a working group.

6. Mr. PANDIT (Nepal) said his delegation considered that the concept of a "watercourse" did not necessarily apply to every single part of a watercourse. He shared the view of the Brazilian Government that the definition of an international watercourse in article 2 applied only in those situations where the use of a watercourse or of its water affected uses in other States. Nepal had a special interest in that matter, since several rivers which originated in the country went beyond its boundaries: Nepal being the upper riparian country, the use of watercourses for domestic purposes, such as irrigation and the generation of electricity, should not fall within the scope of the draft articles.

(Mr. Pandit, Nepal)

7. His delegation had some reservations on the rules laid down in articles 5 and 6. In the former, for example, the term "equitable and reasonable manner" needed to be defined clearly. Nepal's economy was heavily dependent on the use of watercourses for irrigation and the generation of electricity, and it therefore considered that article 5 should not oblige watercourse States to share the benefit they derived from the use of a watercourse. The article should be read in conjunction with article 7, which imposed an obligation on watercourse States to utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

8. The concept of "participation" in article 5, paragraph 2, likewise merited further discussion, and should perhaps be replaced by the term "cooperation", which implied mutual understanding between watercourse States in utilizing and managing the international watercourse.

9. The concept of "appreciable harm" used in the draft articles seemed to be vague and ambiguous, and should be replaced by "substantial harm", which would make it clear that insignificant harm was not covered by the draft articles, thus avoiding unnecessary misunderstandings between watercourse States.

10. The problem of pollution, dealt with in part III, was a complex one, resulting from the immense growth in industrialization, transportation and the use of highly toxic substances. The international community had expressed its great concern to ensure that waste disposal and other watercourse activities did not impair the quality of water. Accordingly, watercourse States must take the necessary steps to prevent pollution, and there must be a thoroughgoing discussion of article 21 before the obligation it imposed was brought into effect.

11. Mr. LIU Zhenmin (China) said it was very difficult to draft articles on the law of the non-navigational uses of international watercourses because such watercourses flowed through different States and accordingly constituted natural resources of the respective riparian States. The draft articles should therefore be so formulated as to ensure that international watercourses would be used by watercourse States in a fair and reasonable way without any encroachment on their sovereignty.

12. The draft articles emphasized the role played by watercourse States in concluding bilateral and multilateral agreements; that approach should do much to make the draft articles easily acceptable to all countries.

13. His delegation questioned whether the concept of an international watercourse system should be used in the draft articles. That concept had long been a controversial one in the International Law Commission and the Sixth Committee. In 1980 the Commission had adopted a working hypothesis stating that to the extent that parts of the waters in one State were not affected by or did not affect uses of waters in another State, they should not be treated as being included in the international watercourse system. That provisional working hypothesis, however, was an inviolable whole; the Commission's abrupt

(Mr. Liu Zhenmin (China)

decision at its forty-third session to incorporate the idea of "system" in the definition of watercourses had raised a fundamental question, and the Commission's inconsistent treatment of the working hypothesis deserved further consideration.

14. While using the terms "watercourse" and "international watercourse" and deleting the term "system" in square brackets, the Commission had none the less used the idea of a "system" in defining a "watercourse" in the draft articles. From a geographical point of view, the hydrographic components of a watercourse, including surface water and groundwater, did constitute a whole system, hence the Commission's decision. In addition, the phrase "flowing into a common terminus" misrepresented the scope of an international watercourse system, for the scope as thus defined could well extend to a large part of the territory of a State, which would then be unreasonably included in the scope of an international watercourse system and placed under joint international jurisdiction, with a consequent encroachment on the sovereignty of the State in question.

15. It was difficult to understand why the idea of the relative international character of watercourses had not been included in the draft articles; his delegation saw that idea as an integral part of the working hypothesis. Of course, a number of members of the Commission believed that the idea, once incorporated, might make the implementation of the draft articles more complicated. China needed to give further consideration to that question.

16. The non-navigational uses of international watercourses were important to national economies, people's livelihoods, and the protection of the environment. As the characteristics of international watercourses were very variable, watercourse States had different interests and were beset by many contradictions. It was therefore not easy to establish a set of legal norms that would be universally acceptable.

17. Mr. Sandoval (Ecuador), Vice-Chairman, took the Chair.

18. Mr. PETROV (Bulgaria) said his delegation would prefer a framework instrument providing States with guidelines for concluding agreements on the non-navigational uses of specific international watercourses. Unfortunately, that approach had not been followed consistently by the Special Rapporteur, particularly in articles 26, 27 and 28. His delegation held that such matters should be left entirely to the discretion of States, and that article 32 was unnecessary as the principle embodied therein had become a norm of general international law.

19. He shared the doubts expressed by some delegations as to the appropriateness of including groundwater, and especially confined groundwater, in the definition of an "international watercourse".

20. His delegation strongly favoured the proposal that in the term "appreciable harm" the word "appreciable" should be replaced by a less

(Mr. Petrov, Bulgaria)

ambiguous one such as "significant" or "substantial". Retention of the word "appreciable" would place an unjustifiably heavy burden on upstream States.

21. Lastly, Bulgaria regretted that the draft did not contain provisions for resolving eventual disputes over conflicting uses of an international watercourse. Mere reference to general international law would not suffice. Therefore, his delegation would welcome the drafting of new articles to address the matter.

22. Mr. VILLAGRAN KRAMER (Guatemala) said that the report of the International Law Commission lucidly described the scope of conventional law and practice regarding the non-navigational uses of international watercourses. As the Chairman of the Commission had observed, there had been a growing number of disputes over diversion of waters, flow reduction, pollution, salinization, sedimentation in tributaries and floods caused by erosion, because the situation had evolved substantially since similar questions had been studied in the 1930s by the Institute of International Law. The draft articles prepared by the Commission provided a useful way of approaching those and other problems relating to the use of international watercourses.

23. The Commission had rightly perceived that whole watercourse systems could not be subject to one agreement; different agreements needed to be reached for different situations, and not all the problems facing the countries involved need be solved at the outset. What the Commission had provided were guidelines for future agreements. Guatemala was very interested in the question, as it shared four rivers with neighbouring countries, two on the Pacific coast and two on the Caribbean coast.

24. Since each watercourse system was different from the others, the regime regulating one system could not necessarily be extended to other systems. The rules suggested by the Commission could be applied to one or more watercourse systems as States might see fit, and States must remain free to adapt their agreements to each situation.

25. His delegation found the Commission's treatment of the concept of a "system" appropriate; that concept made it possible to manage, administer and control common waters in such a way as to ensure their correct use and preserve them from harm. However, like some other delegations, Guatemala found the term "appreciable harm" less acceptable. Legal texts should use clearly defined legal concepts, and the concept of "appreciable harm" was very ambiguous. Guatemala respectfully urged the Commission to reconsider the term and to substitute a more appropriate one indicating that the harm was "substantial" or "considerable".

26. With respect to article 10, he felt that the term "custom" was inappropriate and should be replaced by "tradition" or "practice". His exact words were: "cuando no existe un pacto y si existe por el contrario 'la tradición o la práctica consagrada' la prelación de un uso particular es entonces aceptado"; he contrasted this with the ILC drafting.

(Mr. Villagran Kramer, Guatemala)

27. Articles 26 and 27 were a remarkable achievement on the part of the Commission, but more consideration should be given to the scope of articles 5 and 6, which were clearly logically linked to articles 26, 27, 28 and 29.

28. Mr. VERENIKIN (Union of Soviet Socialist Republics) said that, at its forty-third session, the Commission had discussed such important issues as the use of the terms "international watercourse" and the concept of a watercourse as a "system", the inclusion of groundwater within the concept of a watercourse system and the notion that a watercourse had a "relative international character". It was evident that solutions to those questions would determine the future definition and regulation of all the legal relations governing cooperation between States in the protection of water resources and the security of watercourse installations.

29. In view of the global and interdependent nature of ecological problems, his delegation considered that the preparation of a legal instrument on water utilization would be of benefit to environmental protection.

30. Article 2 of the draft was aimed at providing the broadest interpretation of the concept of a watercourse, including the whole system of interdependent hydrological components. His delegation recognized the need for an overall approach to an international watercourse as a system in constant motion, an approach which would take full account of the principle of equitable and reasonable utilization of the watercourse. At the same time, his delegation assumed that, at the current stage of scientific, technological and industrial development, an unduly broad approach might to some extent restrict the right of each country to utilize its own resources in accordance with national priorities and interests.

31. Like some previous speakers, he considered that it would not be appropriate to include groundwater in the scope of the draft articles without some qualification. Particular attention should be paid to resolving such problems as the demarcation between "free" and "confined" groundwater and the physical link between the latter and surface water. It should be noted that in preparing the draft articles less account had been taken of the specific features of groundwater, the conditions for its exploitation and its protection from pollution. The question of including groundwater within the sphere of application of the draft should be the subject of further consideration by legal and other specialists.

32. With regard to the relative international character of a watercourse, it would not be appropriate at the current stage entirely to overlook the working hypothesis that a watercourse was international only inasmuch as utilization of its water affected the water in another system.

33. His delegation supported the establishment of broad cooperation between States in order to protect water resources and to ensure the security of watercourse installations. It also stressed the need to take into account the common and individual interests of watercourse States. It supported the idea

(Mr. Verenikin, USSR)

of setting up joint commissions of riparian States in order to solve problems when they arose. It also wished to point out that the introduction of joint management of a watercourse, unlike agreement on the individual management by each State of its portion of the watercourse, would require in each instance the conclusion of a specific agreement.

34. Mr. MONTES DE OCA (Mexico) said that his country's interest in the topic under discussion stemmed from the fact that its territory was bounded on three sides by international watercourses. Part II of the draft articles adopted by the Commission, dealing with the principles which should govern the activities of States with regard to the non-navigational uses of international watercourses, was of great importance, since States must act within a clearly defined code of conduct based on justice and equity. For that reason, his delegation proposed that some principles which had been included in earlier versions of the draft, but deleted from the current one, should be reincorporated, namely, good faith and the prohibition of the abuse of rights. Indeed, articles 5 to 10 dealt with various obligations of States, all of which must be complied with in a spirit of good faith.

35. His delegation believed that the above-mentioned provisions should be strengthened; for example, in article 5, paragraph 1, the term "optimal utilization" should be changed to "optimally sustainable utilization".

36. With regard to the use of the term "appreciable harm" in articles 7, 12, 21, 22, 28 and 32, his delegation believed that the ambiguity of the word "appreciable" would make it difficult to determine whether harm had been caused. That was particularly true in the case of article 12 (Notification concerning planned measures with possible adverse effects). If the State which planned to implement the measures did not believe that they might have "an appreciable adverse effect' on another State, it would not provide notification and might in fact cause harm to that State.

37. It might be advisable to include in all the draft articles provisions similar to those in articles 4 and 18 which gave every watercourse State the right to participate in the negotiation of any agreement applying to the entire watercourse. Furthermore, the wording of article 9, concerning the regular exchange of data and information, and of articles 11 to 19, concerning notification, should be more forceful. In addition, the notification of planned measures should be accompanied by a statement of the impact of such measures on the environment.

38. Mr. ROSENSTOCK (United States of America) said that while his country, as both an upper and a lower riparian State, had largely solved most of its problems in connection with international watercourses with its two neighbours or had established mutually satisfactory procedures to that end, he believed that the draft articles responded to a global need. The decision to develop a framework agreement containing general, residual rules designed to be complemented by more specific agreements concluded by States sharing a

(Mr. Rosenstock, United States)

watercourse had been shown to be altogether appropriate. The fact that some principles contained in the draft articles did not apply only to rivers did not detract either from their validity or the usefulness of the exercise.

39. The scope of the draft was judicious, in that it constituted a coherent whole, but refrained from trying to deal with every potential issue. His delegation concurred with the decision to dispense with a detailed annex.

40. There was, however, need for detailed adjustments to the text; the system by which the draft articles underwent a first reading, followed by written comments from Governments and a subsequent second reading anticipated the likelihood of such a need. His Government would be making some concrete suggestions in its written comments, dealing in particular with the term "appreciable harm", which seemed to it too broad, and the need for consistent application throughout the draft of the fundamental rule of equitable and reasonable utilization. He noted that the statements made by the delegations of Germany and Colombia seemed to be in agreement on many of the issues on which his Government would be communicating in writing. He hoped that as many States as possible would take the opportunity to submit their comments, noting that in recent years the Commission had not always received as wide and candid a response as would be desirable. That shortcoming had contributed to some of the problems which had plagued the final or legislative phase of the codification effort. His delegation pledged itself to contribute to the process of "fine tuning" a text which was in general acceptable.

41. Mr. AL-BAHARNA (Bahrain) said his delegation welcomed the fact that the Commission had successfully concluded its first reading of the draft articles on the law of the non-navigational uses of international watercourses, focusing its attention principally on the definition of an international watercourse and, secondly, on the concept of a watercourse as a "system". In the latter context, the Special Rapporteur had examined the views of geographers, hydrologists and other exports and had stated that it was the view of such specialists that surface water and groundwater should not be treated separately for legal and planning purposes. The necessity of regulating the rights and obligations of international watercourse States became evident when it was realized that underground waters constituted approximately 97 per cent of the fresh water resources on Earth, excluding ice-caps and glaciers. His delegation was pleased to note from paragraph 55 of the Commission's report that the debate had indicated clearly that groundwater should be included in the scope of the articles, at least in so far as it was related to surface water. His delegation welcomed the fact that the definition of a watercourse as finally adopted on first reading included underground waters within its ambit.

42. The issue of using the "system" concept in the draft articles was one of the most difficult before the Commission. Although the geographical and legal implications of the "system" approach over the "territorial" approach were not yet fully clear, the former had been steadily gaining ground in doctrine and

(Mr. Al-Baharna, Bahrain)

State practice, as had become evident from the Helsinki Rules adopted by the International Law Association in 1966.

43. At its forty-third session, the Commission had also considered the question whether, for the purpose of the draft articles, a watercourse should be regarded as having a relative international character. As the Special Rapporteur had noted, the debate had indicated clearly that the notion of the relative international character of a watercourse should not be included in the definition in so far as the concept was thought to be no longer necessary. In his delegation's view, the Commission had given a persuasive reason why part of the so-called working hypothesis should be abandoned, and he would accordingly support the Commission's conclusion that the notion of relativity should be dropped.

44. In conclusion, he said that after carefully examining the draft articles, his delegation considered that the time had come for the transmission of the draft articles to Member States, and it would be glad to support a resolution to that effect. It also wished to reiterate its view that the objective of the draft articles was to produce a framework agreement on the topic. The articles adopted on first reading adequately served the purposes and requirements of such an agreement, and he hoped that they would not be subject to prolonged discussion or unduly altered on second reading.

45. Mrs. FLORES (Uruguay) said that the draft articles on the law of the non-navigational uses of international watercourses, were of special interest to her country, whose borders consisted largely of international watercourses and 75 per cent of whose territory was situated in a major South American river basin. The topic was also of concern to the international community as a whole since it was related to the use of fresh water, an area in which international law should be codified as soon as possible in order to regulate the equitable and reasonable utilization of that resource. It was now more urgent than ever to protect ecosystems and to establish appropriate guidelines for the protection and preservation of the environment. Consequently, the draft articles should be codified in the form of a convention and should not aim at the establishment of model rules or guidelines.

46. With respect to part I of the draft articles, her delegation believed that draft article 2 should also cover "confined" groundwater since the utilization of such water would have an impact on the system as a whole. Article 3, paragraph 3, should be amended in such a way as to place an obligation on States to negotiate in good faith. Article 4, paragraph 2, should confer on a watercourse State which considered that some of its current or proposed uses of an international watercourse might be affected to an appreciable extent by the implementation of a watercourse agreement that applied only to a part of the watercourse or to a particular project, programme or use the right to participate in consultations on, and in the negotiation of, such an agreement, and to become a party thereto. The draft article should also require a watercourse State that participated in consultations on, or in the negotiation or elaboration of, a watercourse agreement and which was aware of the possible

(Mrs. Flores, Uruguay)

appreciable effect of the use which another watercourse State made or planned to make of the watercourse, to inform such State of the possibility as early as possible.

47. With respect to part II of the draft articles, her delegation wished to suggest the inclusion in article 6, paragraph 1, of a subparagraph referring to a balance between the benefits and drawbacks which a new use or modification of an existing use could entail for watercourse States. Paragraph 2 of the same article should provide for an obligation to negotiate, having regard to the factors listed in paragraph 1, with a view to determining in the specific case what was equitable and reasonable. Article 7 should impose the obligation to adopt all necessary measures to prevent harm. Article 10, paragraph 2, could be complemented by provisions relating to the procedures necessary to achieve a concrete solution to a dispute, such as the obligation to negotiate or the establishment of a system for the peaceful settlement of disputes. Certain requirements for current and new uses of international watercourses should be standardized, as had been done in a number of conventions relating to specific activities concerning the sea.

48. Part III of the draft articles should provide for an obligation to undertake studies on the effect which planned measures could have on current or future uses of international watercourses and a duty to communicate the results to the other watercourse States. Article 12 should not place upon the State implementing the measures the sole responsibility for determining whether such measures could have an appreciable adverse effect on other watercourse States. Article 17, paragraph 3, could provide for the suspension of the implementation of the planned measures until agreement was reached, with a time-limit set for negotiations. Where no solution was reached, recourse would be had to other means of peaceful settlement, and to the courts in the final instance. The provisions of article 17 containing the amendments suggested above should also apply to article 18, paragraph 2. In article 18, paragraph 3, the provisions of article 17, paragraph 3, should apply. The formal declaration referred to in article 19, paragraph 2, should be communicated to all watercourse States to permit each of them to evaluate the extent to which it would be affected. Provision should be made that, after the urgent situation had passed, the State which had implemented the measures should negotiate with the other watercourse States a definitive solution to the problem. The State which had implemented the measures should also repair the damage which the measures caused to the other watercourse States. Any watercourse State, and particularly one that had been notified, should have the right to inspect the work being implemented in order to determine whether it corresponded to the project that had been proposed.

49. With respect to part IV of the draft articles, in article 20 and in article 21, paragraph 2, the word "and" should be substituted for the word "or", so that the protection would be both individual and joint. Provision should also be made for the establishment of environmental standards, and the draft articles should require States to undertake environmental impact

(Mrs. Flores, Uruguay)

assessments prior to the implementation of any measure and to communicate the results to the other watercourse States without delay. It would also be useful to include the principle of non-discrimination with respect to the environment. That meant that watercourse States should not make distinctions between their environment and the environment of other watercourse States in elaborating and implementing legislation on the prevention and abatement of pollution. The draft articles should also provide that a State which polluted an international watercourse should incur liability. Lastly, States should not be allowed to invoke immunity from jurisdiction in cases of harm caused by the use of an international watercourse and a procedure for the peaceful settlement of disputes should be established.

50. Mr. Nedelchev (Bulgaria) took the Chair.

51. Mr. VUKAS (Yugoslavia) said that the Commission's completion of three sets of draft articles was a major contribution to the ongoing process of codification and progressive development of international law. In the draft articles on the law of the non-navigational uses of international watercourses, the Commission had solved several problems relating to the definition of a "watercourse". Some of the difficulties concerning groundwater could be resolved by the conclusion of the envisaged watercourse agreements between watercourse States. However, the adopted formulation, which based the definition on the flowing of the whole system of waters into a common terminus, was vague since it was not clear whether the definition covered a system of waters composed, for example, of lakes, groundwater and even canals unrelated to any river and therefore not flowing anywhere. It might be more logical to define first the generic term "watercourse" and then the specific term "international watercourse".

52. With regard to article 10, on the relationship between uses of international watercourses, his delegation would like to see preference given to domestic and agricultural utilization of watercourses. The existing text of article 10 was still based on the principle that no use of an international watercourse enjoyed inherent priority over other uses and requirements of vital human needs were mentioned merely as the most important factor to be taken into account in the event of conflict between different uses of a watercourse. While the basic principle stated in that article was correctly deduced from State practice, in view of the scarcity of drinking water and the vital importance of water to agriculture, the draft should invite States to accept the principle that domestic and agricultural utilization should have priority. The development of international law in that area was indispensable in view of current population growth.

53. In respect of article 22, which enjoined watercourse States to take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse, the text gave the impression that the introduction of such species was prohibited only if it caused harm to other watercourse States and not if it was detrimental to the ecosystem of the watercourse itself.

(Mr. Vukas, Yugoslavia)

54. The Commission's statement in paragraph (3) of its commentary to article 29 that "the present articles themselves remain in effect even in time of armed confict" was a far-reaching conclusion that was difficult to accept in respect of all the draft articles. Indeed, only the provisions concerning the protection and preservation of the ecosystems of international watercourses had some chances of remaining operative in time of war. All the provisions on inter-State cooperation between the belligerents would necessarily be considered as suspended.

55. Mr. PAL (India) said that Governments would undoubtedly take account of the Special Rapporteur's clear and precise seventh report in their consideration of the development of a universally acceptable regime of non-navigational uses of international watercourses. The report had shown a preference for the adoption of hydrological unity as the basis of a legal regime to govern water resources in general and international watercourses in particular. While his delegation agreed that geographical and hydrological factors deserved some attention, it doubted the relevance of those factors to the development of a regime on watercourses which crossed international boundaries, thereby bringing into play other equally relevant factors such as State sovereignty, mutual benefit and the primacy of the interest of the State over its natural resources. Such factors did not necessarily support the argument for an integrated treatment of the regime on watercourses. The protection, planning, and development of water resources should be based on the needs of the population of the territory through which the river first flowed, in accordance with the principles of optimal, reasonable and equitable distribution of water resources. While integrated basinwide and regional development, protection and planning were desirable, cooperation in those areas should be based on the common interests of States in the region and should not result from mandatory legal obligations developed without due regard for such common interests.

56. The principle of the sovereign equality of States required that, while they had the freedom to engage in any activity, States should refrain from injuring the interests of other States. Specific policies aimed at developing a regime of international watercourses should, however, promote the interests of all States and should not shift natural priorities or accord unacceptable rights of interference to one or more States in the sovereign domain of another State.

57. The Special Rapporteur's emphasis on the unity of the hydrological cycle required further study and the draft articles should continue to be based on the working hypothesis adopted by the Commission concerning the relative international character of watercourses. International watercourses could be treated as a system only in the limited sense that their use could cause substantial harm or injury to co-riparian States.

58. Lastly, his delegation believed that the regime on international watercourses should not deal with groundwater in general, since that required a separate and wholly different analysis.

59. Mr. KIRSCH (Canada) said that the law of the non-navigational uses of international watercourses was of considerable importance to his country. It was a major achievement for the Commission, after 20 years of work, to have completed the first reading of a proposed framework agreement on the question. At a time of rapidly increasing demands for fresh and pure water supplies, it was urgent for the international community to adapt appropriate measures to safeguard such supplies for future generations. His delegation agreed with the Special Rapporteur that the draft text should consist of a framework of residual rules and not merely a code of conduct. The complexity and the diversity of geographical, political, economic, environmental and legal issues relating to particular watercourse systems made it impossible to establish one set of binding legal obligations for all international watercourses. It must be clear at the outset that States had the right to opt into the framework agreement, partially or wholly, or to opt out of it when, for example, existing international treaties adequately covered a particular situation. Thus, his delegation was of the view that the Commission had taken the right approach.

60. Article 10 appeared to reflect the evolution which had taken place over the past century. Since watercourses were no longer used mainly for navigation, the Special Rapporteur had been justified in stating that no single use should have priority over others.

61. With regard to article 26, dealing with the joint management of international watercourses, he felt that the precedent established by the 1909 Treaty between Canada and the United States relating to boundary waters, which had led to the establishment of the International Joint Commission, was one which other States might well emulate. While political differences might make it impossible to establish joint management systems for all States interested in a particular international watercourse, such a system would seem to be appropriate for the efficient fulfilment of such obligations as those embodied in articles 6, 8, 9 and 10 and in part III. Indeed, it might be desirable to involve in joint management all States which had an interest in or which might be affected by the actions of watercourse States.

62. While article 27 addressed the concerns which his delegation had previously expressed as to the need for clarification of the term "regulation", paragraph 2 did not go far enough. The Commission should consider other means of giving effect to the obligation to cooperate, namely, through bilateral, regional or international organizations, thus providing for situations in which political realities did not allow for direct cooperation between States.

63. His delegation believed that article 28 should be further strengthened. As currently drafted, it merely called on States to enter into consultations with regard to the safe operation or maintenance and the protection of watercourse installations. In his view, the article should clearly establish the duty of watercourse States to use their best efforts to maintain and to protect such facilities from natural hazards or from wilful or negligent acts.

64. With regard to article 29, his delegation welcomed the inclusion of a reference to the rules of international law governing armed conflicts.

(Mr. Kirsch, Canada)

65. A number of other substantive issues required further consideration, such as the question raised by article 2 (b), namely, whether both surface and underground waters should be covered by the proposed framework agreement as "a unitary whole", and whether the basic criterion should be that the waters in question were "flowing into a common terminus". On principle, the proposal appeared to be sound, since self-contained underground reservoirs not physically connected with the watercourse system were excluded from the scope of the draft articles. However, the provision could create serious difficulties for certain States if their water resources were not already covered by specific agreements. Questions might arise, for example, as to the duty of States with underground reservoirs in respect of other States interested in the same international watercourse.

66. Some members of the Commission had suggested that "confined" groundwater could be the subject of a separate study with a view to the preparation of draft articles. Views differed as to whether canals should be included in the definition of a watercourse. Similarly, views differed with regard to the statement in paragraph (5) of the commentary to article 2 that the term "watercourse" encompassed not only rivers, lakes, reservoirs and canals but also glaciers. While the argument developed in the commentary was persuasive from the philosophical, environmental and legal points of view, the issue raised serious political problems for many States.

67. With regard to the use of the phrase "appreciable harm" in article 7, his delegation was of the view that it was appropriate. Eliminating the adjective could impose an intolerable burden on any State wishing to carry out any kind of activity which might have even a minor impact on an international watercourse; on the other hand, altering the text by including a phrase such as "major harm" could enable the upstream States to act as they wished without regard for the interests of downstream States unless "major harm" was likely to ensue.

68. Mr. GODET (Observer for Switzerland) said that having adopted, on first reading, the draft Code of crimes against the Peace and Security of Mankind, the International Law Commission would be able to give further consideration to the question of an international jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism. The Code should aim at establishing a system of universal competence in accordance with the principle aut judicare aut dedere. It was, after all, primarily for States to prosecute crimes against the peace and security of mankind. The progress made within the international community in respect of reciprocal judicial assistance should make it easier for national courts to overcome the obstacles encountered in establishing facts and assembling evidence. His delegation did not object in principle to the establishment of an international court which would be competent to review decisions taken by national courts; that formula would have the advantage of preserving the sovereignty of States while ensuring the application of the Code since the international criminal court would be able to hear appeals from

(Mr. Godet, Observer, Switzerland)

convicted persons or from the victim State if it considered a penalty to be too lenient or if the national courts concerned had declared that they were not competent. Thus the international court would primarily serve the function of an appeal court. If required, the court could also settle disputes of competence between States.

69. Acceptance of the statute of an international criminal court should mean acceptance of its competence. The crimes envisaged in the Code were so serious that the competence of an international criminal court could not depend on the separate consent of the States parties.

70. On the question of applicable penalties, it was noteworthy that despite the variety of national legal systems, all of them made provision for deprivation of liberty. It was therefore indisputable that crimes against the peace and security of mankind should be punishable by long-term imprisonment, subject to commutation where there were extenuating circumstances. Respect for the rule nulla poena sine lege required that crimes envisaged by the Code should be subject to different penalties taking into account their degree of seriousness. While all the crimes included in the Code were extremely serious, some, such as genocide, were particularly objectionable to the human conscience.

71. With regard to the respective roles of an international criminal court and the Security Council in cases of crimes of aggression or threat of aggression, it would not be desirable to make the institution of criminal proceedings contingent on a prior determination by the Security Council of an act or threat of aggression. The court, a judicial body, and the Security Council, a political body, would not operate at the same level; moreover, in the past the Security Council had sometimes been paralysed by the exercise of the right of veto. It would be incompatible with a proper concept of criminal justice to make incrimination dependent on the decision or non-decision of a political body.

72. Turning to the draft articles, he noted that article 3, paragraph 1, rightly limited criminal responsibility for crimes against the peace and security of mankind to the individual. States could still be liable for reparations within the context of the international responsibility of States, as noted in article 5. With regard to article 4, his delegation believed that the motives that had inspired a person accused of a crime against the peace and security of mankind were not irrelevant and could be taken into account in determining the penalty. Article 14 should be made more precise and should include an exhaustive list of the defences and extenuating circumstances it referred to. The reference to general principles of law was not sufficiently clear. Moreover, defences were a question of responsibility, or of attributability, while extenuating circumstances came into play in determining the penalty once responsibility had been attributed. There should therefore be two separate articles, which would not necessarily be consecutive.

(Mr. Godet, Observer, Switzerland)

73. Article 22 referred to the use of unlawful weapons as an exceptionally serious war crime; while the 1868 St. Petersburg Declaration laid down the customary rule prohibiting weapons that would cause unnecessary suffering, if the prohibition or regulation of such methods or means of combat was to be effective it should be covered in a convention. A number of the conventions regulating the use of certain weapons had been ratified by only a limited number of States and the question then arose as to whether a weapon prohibited under treaty law was illegal for nationals of a State which was not party to the convention in question. Nevertheless, his delegation could accept the wording of article 22 which, as noted by the Commission, did not prejudge the question of punishment, under international law applicable to armed conflicts, of crimes not covered in the Code.

AGENDA ITEM 126: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued) (A/C.6/46/L.6)

74. The CHAIRMAN announced that China, Uganda and Yemen should be added to the list of sponsors of draft resolution A/C.6/46/L.6.

AGENDA ITEM 135: DEVELOPMENT AND STRENGTHENING OF GOOD-NEIGHBOURLINESS BETWEEN STATES (continued) (A/C.6/46/L.5; A/46/605-S/23176)

75. Mr. HAMAI (Algeria) said that the concept of good-neighbourliness between States was universally accepted in international relations. It was embodied in the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the Manila Declaration on the Peaceful Settlement of International Disputes, while those texts mentioned were not specifically concerned with good-neighbourliness, that concept was one of their principal underlying themes and was essential to their implementation. Moreover, individual States had often reaffirmed their commitment to the principle of good-neighbourliness, which was one of the major components of Algeria's foreign policy in its efforts to promote the establishment and development of a peaceful and united Maghreb.

76. There had been a loss of interest in considering the topic of good-neighbourliness in the Committee on the ground that the concept was non-legal in nature. His delegation did not share the view that the concept was merely a type of attitude or moral behaviour but believed that it was a major political principle of international relations and that it had clear legal implications. The concept of good-neighbourliness involved the question of frontiers, which was clearly legal in nature, as evidenced by the theory of uti possidetis juri in Latin America and the principle of the inviolability of the frontiers in existence at the time of accession to independence upheld by the Organization of African Unity. The principle also had clear legal content when it was viewed in the light of respect for the general principles of international law, including sovereignty, the inviolability of frontiers,

(Mr. Hamai, Algeria)

non-use of force, the peaceful settlement of disputes and non-interference in the internal affairs of States, all of which were incontestably legal in nature, but also had an undeniable political basis. The report of the International Law Commission provided two significant examples of the legal content of the principle of good-neighbourliness: the draft articles on the law of the non-navigational uses of international watercourses, which were all based on the principle of good-neighbourliness, and the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law which would regulate the liability of States for acts causing transboundary damage to neighbouring States.

77. Although some aspects of the principle of good-neighbourliness were already regulated by existing international legal instruments, that had been true of other principles in respect of which the international community had been prepared to draw up international conventions bringing together scattered provisions, such as the draft articles on the status of the diplomatic courier and the diplomatic bag. There was therefore no justification for removing the question of good-neighbourliness from the Committee's agenda.

78. Since draft resolution A/C.6/46/L.5 left all possibilities open, including a reinclusion of the item in the General Assembly's agenda, his delegation would join the consensus if there was general agreement on that course. However, it would have preferred an automatic reinclusion of the item in the agenda of the forty-seventh or forty-eighth session of the General Assembly and a decision either to revive the Subcommittee on Good-Neighbourliness or to establish another appropriate body. The results already achieved by the Subcommittee on Good-Neighbourliness on a highly controversial topic could be a good basis for continued consideration of the question. The Committee would then be able to make a significant contribution to the United Nations Decade of International Law.

79. Mr. MBURI (United Republic of Tanzania) said that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations laid down adequate principles for the conduct of good-neighbourly relations. General Assembly resolution 43/171 A and B referred to the unprecedented interdependence of nations as a result of major political, economic and social changes; since then the changes had been multifold and the need to reaffirm and strengthen good-neighbourliness in response to them had increased. The new international climate of cooperation and the role played by the United Nations in peacemaking and peace-keeping had enhanced further prospects for good-neighbourly relations between States. Isolated incidents of violations of that principle had been dealt with in their proper perspective.

80. His delegation had always had serious doubts about the usefulness of considering agenda item 135 because of the difficulty of identifying and clarifying the elements of good-neighbourliness, the impracticability of persuading States to follow a certain pattern of conduct in relations with

(Mr. Mburi, Tanzania)

their neighbours, geographical and historical diversity, and the existence of other instruments which were adequate for the purpose. His delegation therefore fully supported the draft resolution. Good-neighbourliness had always been one of his country's principal foreign policy objectives and it would continue to support all positive efforts intended to foster good-neighbourly relations between States in accordance with international law.

81. Mr. IBRAHIM AHMED (Yemen) said that within the context of the political, economic and social changes in the modern world and the efforts of peoples and States to establish a new international order in which relations were based on the rule of law and the respect for the national sovereignty of States regardless of their size or economic status, the application of the principles of good-neighbourliness as defined in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations was vitally necessary in order to promote coexistence in a changed world in an atmosphere of security, stability and peace. The Republic of Yemen which had been established by a peaceful and democratic merger of its two parts in May 1990, had adopted a democratic approach based on pluralism and human rights. It was very well aware of the great importance of allowing countries and nations to choose their own political course and attached special importance to the principle of good-neighbourliness. Yemen intended to be a factor of stability in its own region.

82. It would be worth considering the possibility of reviving the activities of the Subcommittee on Good-Neighbourliness. His delegation welcomed draft resolution A/C.6/46/L.5, although it would have preferred to specify that the item should be taken up at the next session of the General Assembly.

83. The CHAIRMAN said that if he heard no objection, he would take it that the Committee wished to adopt draft resolution A/C.6/46/L.5 without a vote.

84. It was so decided.

85. Mr. VILLAGRAN KRAMER (Guatemala) expressed appreciation to the delegation of Romania for its efforts in sponsoring consideration of the question of the development and strengthening of good-neighbourliness between States. At one time a great wall had existed in Europe and it had not been possible to discuss such matters tranquilly, but lawyers had looked forward to the day when that wall would disappear and the United Nations would be able to take up the matter.

The meeting rose at 12.35 p.m.

UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
29th meeting
held on
Tuesday, 5 November 1991
at 3 p.m.
New York

SUMMARY RECORD OF THE 29th MEETING

Chairman: Mr. AFONSO (Mozambique)

later: Mr. TETU (Canada)

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The meeting was called to order at 3 p.m.

AGENDA ITEM 126: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued) (A/C.6/46/L.6)

1. The CHAIRMAN announced that Costa Rica had become a sponsor of draft resolution A/C.6/46/L.6 entitled "Progressive development of the principles and norms of international law relating to the new international economic order".

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

2. Mr. RAZAFINDRALAMBO (Madagascar) said it was encouraging that the International Law Commission, which had strictly abided by the terms of its mandate, had been able to adopt in first reading the draft Code of Crimes against the Peace and Security of Mankind after 10 years of work and despite the scepticism of those who were concerned about the highly sensitive political nature of the draft Code.

3. In its general structure the draft Code was simple, precise but complete, and should prove eminently workable.

4. His delegation felt that article 4, by introducing a special provision on motives, could give rise to confusion and should therefore not be included in the Code. By definition, motive was not one of the constituent elements of a crime, although in certain cases, such as genocide, a constituent element of the crime, in that case the intention to destroy a racial group, was closely linked to a racist motive. It was possible, for example in the case of international terrorism, to take motive into consideration either by way of extenuating circumstances (in the context of the struggle for national liberation) or of aggravating circumstances (narcoterrorism).

5. Article 5, concerning the responsibility of States, was justified because, in view of the principle that only an individual could be criminally responsible for a crime against the peace and security of mankind, it was necessary to establish that that responsibility in no way excluded the responsibility of the State for internationally wrongful acts.

6. The inclusion in a single article, article 14, of two concepts as different as defences and extenuating circumstances could not be justified even on a provisional basis. Moreover, the definition of a defence, because of the oversimplification, was liable to give rise to difficulties of implementation; the Commission should therefore give careful consideration to circumstances which precluded incrimination. The second paragraph of article 14, while explicit in respect of extenuating circumstances, made the mistake of omitting aggravating circumstances. Even though the crimes included in the draft Code were all extremely serious, there was no

(Mr. Razafindralambo, Madagascar)

justification for the omission of aggravating circumstances, unless there was to be a single, non-extendable penalty.

7. His delegation, which for the time being did not wish to comment on the crimes identified by the Commission and would at an appropriate time transmit the replies of its Government to the questions posed by the Secretary-General, considered that the problem of applicable penalties was just as important as that of the definition of crimes, because penalties were one of the pillars of the Code. That subject should therefore form a special chapter, either in the introduction, or in the section on crimes, a fortiori if there was consensus in favour of a single penalty, as his delegation hoped there would be, taking into account the identical and specific nature of all crimes against peace and security.

8. As to the type of applicable penalties, taking into account the very sharp division between proponents of the death penalty and advocates of its abolition, the only possible compromise was to provide for life imprisonment, without prejudice to the possible application of extenuating circumstances or a commutation of penalties for humanitarian reasons, after a minimum period of 15 to 20 years, except for cases where aggravating circumstances existed.

9. The Code should also make provision for accessory penalties and supplementary penalties. The total confiscation of property should, in theory, be a required supplementary penalty, particularly in cases of illegal drug trafficking; it would be optional in cases where the criminal origin of property was doubtful. The judge would have to determine in all cases who would receive the confiscated property.

10. It would be worth considering the question of grounds for absolution which, in limited and specific cases, for example in cases of illicit drug trafficking, could encourage accomplices or partners to denounce the other offenders.

11. Lastly, there could be an article on civil action providing for sentencing of the accused to the payment of damages, or even restitution of the stolen property.

12. Turning to Part Two of the ninth report of the Special Rapporteur (on the jurisdiction of an international criminal court), he said that his delegation had always considered that there was a close link between the Code and its implementation and that the Code should therefore be accompanied by a legal enforcement mechanism.

13. Unlike the advocates of a system of parallel jurisdiction, his delegation did not believe that such a system would constitute only a limited infringement of the sovereignty of States, since the court would rule in cases of appeal, cassation or review and would therefore have the power to disagree with decisions which had already been considered at all levels of the national jurisdiction. It would therefore be preferable to consider establishing a

(Mr. Razafindralambo, Madagascar)

court with a statute similar to that of the International Court of Justice, incorporating a procedure for recognition of jurisdiction under which all States parties to the statute would recognize that the court had exclusive jurisdiction to judge individuals suspected of having perpetrated a crime, but only by application of one or other of the principles of territoriality or active or passive personality. Other alternatives could be envisaged. At all events, the recognition could always be reviewed after a certain period of time. In order to test the validity of such a solution, an interim international criminal court could be established, with the power to interpret customs, laws and international criminal conventions. That would help to ensure the uniform application of laws and conventions, whether there was parallel jurisdiction or exclusive jurisdiction; the request for interpretation could emanate from a State or from an intergovernmental organization.

14. The right to submit cases to the court would be reserved to States parties to its statute, so that international organizations, which could not be parties thereto, were excluded.

15. It was the view of his delegation that the rule on separation of powers would prevent referral of cases to the court from being subject to a previous decision by a political organ such as the Security Council. But once a case had been referred to such an organ, the court would have difficulty in ignoring its findings, especially if they bore on the substance of the acts constituting the aggression. However, a refusal by the Council to deal with a complaint, for instance through the exercise of a veto, would have no effect on the normal course of the criminal proceedings, as the court would assess the merits of the criminal complaint entirely independently. Should the complaint lead to a finding of guilt and a conviction, that decision might have political repercussions in the General Assembly or even in the Security Council.

16. Mr. FLATLA (Norway), speaking on the draft Code of Crimes against the Peace and Security of Mankind (A/46/10) on behalf of the Nordic countries, noted that article 3, paragraph 3, introduced the possibility of punishing attempts.

17. The Nordic countries were pleased that a distinction was no longer made in the title of Part II of the draft Code between crimes against peace and crimes against humanity. They also welcomed the Special Rapporteur's decision to include penalties in the draft Code, for they were a vital element of a penal system. The Special Rapporteur was right not to include the death penalty among the penalties for crimes against the peace and security of mankind, for there was a strong trend within the United Nations towards the abolition of capital punishment, as witness the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty. Other international instruments were following, such as Additional Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(Mr. Flatla, Norway)

18. Concerning the question of establishing appropriate penalties, the most natural solution seemed to be a term of imprisonment, with a minimum and maximum for each crime. The crimes covered by the Code all merited severe punishment, but there should be a differentiation in the penalties: genocide, for instance, could not be equated with the recruitment of mercenaries. There was, however, no merit in including community work - even as an addition to another penalty - as a sentence for crimes which, by virtue of their extreme gravity, had been included in the Code.

19. While pleased to note that the Special Rapporteur had presented two draft articles on the jurisdiction of the court and the requirements for instituting criminal proceedings, the Nordic countries maintained the position they had enunciated during the previous session of the General Assembly, namely that it was inadvisable to discuss the establishment of an international criminal court until a draft was available covering all aspects of organizational, procedural and financial matters. As the first reading of the draft Code had been completed, the time seemed to have come for a more comprehensive study of the matter.

20. Without prejudice to the question of establishing an international criminal court, the Nordic countries advocated that the jurisdiction ratione materiae of such a court should encompass all crimes included in the Code, which had been selected because of their gravity. Further, the jurisdiction of the court should not be exclusive, but concurrent with that of national courts, or in combination with that of review.

21. On the question of which States should have the right to institute proceedings, the draft provision submitted by the Special Rapporteur formed a good basis for further consideration. However, only States parties to the statute of the court which had a relevant link to the crime in question should have the right to institute proceedings.

22. Mr. VARGAS (Chile) said that the draft Code of Crimes against the Peace and Security of Mankind was built around three basic elements: (a) the characterization of the offence in accordance with the principle nullum crimen sine lege; (b) the determination of the penalty for each offence under the principle nulla poena sine lege; and (c) a court having jurisdiction in the case to rule on it.

23. With respect to the characterization of offences, Part I of the draft Code was particularly important in that jurists must also be involved in formulating the principles underlying the law. Hence, articles 1 to 14 formed a solid basis which would allow his delegation to make its contribution to consideration of the draft Code in second reading.

24. Article 3, on responsibility and punishment, was particularly important. The commission of an illegal and reprehensible act that so harmed the social order that it became punishable could involve various degrees of participation. That fact, which was reflected in the internal law of many

(Mr. Vargas, Chile)

countries, including Chile, was also reflected in the draft Code. With regard to the reference in square brackets in paragraph 3 of article 3, his delegation felt it would be preferable to refer to the articles in question and to remove the square brackets. In addition, article 3 should be brought into line with article 5, on the responsibility of States, so as to distinguish the latter from the responsiblity of individuals.

25. Draft article 4 was very important, since it was essential to specify that there were types of behaviour (acts or omissions) that were by their very nature utterly abhorrent, whatever the motives invoked by the accused and not covered by the definition of the crime.

26. The principle of extradition enunciated in draft article 6 was particularly important as one means of combating certain offences. The Chilean Government had concluded various extradition agreements and on several occasions had granted requests for extradition. In that connection, he referred to the multilateral extradition conventions concluded within Latin America, such as the Bustamante Code of 1928, the Montevideo Convention of 1933 and the Caracas Convention of 1980.

27. Draft article 8, which dealt with the judicial guarantees to be given to any person accused of a crime against the peace and security of mankind, was essential to the normal, sound operation of the procedure envisaged. As for draft article 9, non bis in idem, it should be clarified from a conceptual point of view so as to facilitate its implementation. Also, it was essential to take into consideration any defences and extenuating or aggravating circumstances, as under any normal legal system.

28. In keeping with the principle of the peaceful settlement of disputes between States, Chile considered it desirable to repress the crimes against the peace and security of mankind covered by articles 15, 16, 17 and 18 of the draft Code, namely, aggression, threat of aggression, intervention, and colonial domination and other forms of alien domination.

29. The Chilean delegation supported draft article 19 on genocide, based on the definition given in the Convention on the Prevention and Punishment of the Crime of Genocide, which his country had of course ratified. The Convention declared that genocide was a crime under international law which the Contracting Parties undertook to prevent and punish. It also stated that, in addition to genocide, conspiracy, direct and public incitement and attempts to commit genocide, as well as complicity in genocide, should also be punishable. Nevertheless, it should be pointed out that the Convention stipulated that genocide and the other acts enumerated should not be considered as political crimes for the purpose of extradition and the Contracting Parties pledged themselves to grant extradition in accordance with their laws and treaties in force. That criterion should also be included in the draft Code.

(Mr. Vargas, Chile)

30. The proposed provisions of article 20 on apartheid, some aspects of which could be improved on second reading, offered an appropriate description of that evil practice, which it was to be hoped would be eradicated once and for all in the near future.

31. Equally reprehensible were the systematic or mass violations of human rights covered by draft article 21. His understanding of the article was that it referred to exceptionally serious offences committed in a systematic manner or on a mass scale and that isolated acts were covered by the various conventions on the subject, to which his country was a party. It was vital to establish a legal system which would make it possible to ensure greater respect for individual human rights and thus restore and maintain the peace and security of mankind.

32. As a signatory to the 1949 Geneva Conventions and the additional protocols thereto, his country considered it essential that the draft Code should contain provisions such as article 22 on exceptionally serious war crimes and article 23 on the recruitment, use, financing and training of mercenaries.

33. He welcomed the inclusion in the Code of draft article 24 on terrorism, since there were certain human values which must be respected not only by States but also by all those in the political arena and by all sides involved in an armed conflict, whatever its nature.

34. Draft article 25 on illicit traffic in narcotic drugs was of great importance to his country because of its geographical location. As a result, his country had concluded various bilateral agreements for the suppression of such traffic and had advocated the adoption of laws aimed at preventing the production, processing and consumption of and illicit traffic in narcotic drugs.

35. Article 26 on wilful and severe damage to the environment dealt with a very serious issue which needed to be considered in greater depth in the light of the progress made in the field of environmental protection by other international bodies. It therefore seemed premature to seek to codify the matter in a code of the kind under consideration until the outcome of the United Nations Conference on Environment and Development to be held in Rio in 1992 was known.

36. Mr. CALERO RODRIGUES (Brazil) said that he was aware that the Commission had been eager to complete the first reading of the draft Code rapidly in order to make it easier for Governments to respond and that consequently the text before them was not a finished piece of work but an outline giving States an idea of what the Code would be. Indeed, the Commission had itself recognized that the draft Code was open to improvements. In putting forward their remarks, States should bear in mind that, as noted in the report, no final text could be arrived at until a final decision was taken on the question of jurisdiction.

(Mr. Calero Rodrigues, Brazil)

37. The structure of the draft Code as it stood was in keeping with the usual arrangement of criminal codes. A first part defined concepts and set down general principles, while a second defined crimes and prescribed penalties. The main problem with the first part was that several of its provisions lacked clarity and precision, an imperfection due at least in part to the lack of a definition with regard to the question of jurisdiction. Most of the provisions of part II, which defined 12 crimes, were in need of improvement in order to attain the precision essential in criminal law.

38. His delegation had previously expressed serious reservations concerning two of the proposed crimes, namely threat of aggression and activities related to mercenaries. It maintained those reservations and also maintained the position it had previously taken on what was now article 17. While agreeing that the acts described in that article should be included as crimes under the Code, it felt that the reference to "intervention" was unnecessary and incorrect. Intervention, which was a well-established concept in international law, had a much wider meaning than that contained in the article in question and there was no justification for using the term in either the title or the text of the article.

39. Although the draft Code had its flaws, it would be wrong to conclude that it was a bad proposal. On the whole, it provided a useful basis for the establishment of a reasonable international instrument, if - and it was an important if - the international community agreed that such an instrument was needed. His delegation felt that some concepts had evolved in a positive manner. The general structure of the Code was sound and he was glad that the old tripartite division - crimes against peace, crimes against humanity and war crimes - had not been maintained. He was also pleased that the idea of including a separate section on "other crimes" had been abandoned and that attempt and complicity had been given their proper place in part I. He also welcomed the fact that the Commission had decided to include penalties in the Code.

40. He was confident that, in the light of the remarks and observations made by Governments, and after further deepening its own analysis of the problems involved, the Commission would be able to bring its work to a successful conclusion. He also felt that the resolution to be adopted on the question should call on the Secretariat to transmit the draft Code to the International Committee of the Red Cross, which would undoubtedly have valuable observations to make, having long been involved in some of the fields covered by the draft Code.

41. The beginnings of a solution had been found to the question of penalties which had been raised in the ninth report submitted by the Special Rapporteur to the Commission at its most recent session, in that part II of the draft Code provided that the individuals responsible for each crime "shall, on conviction thereof, be sentenced to ...", with the penalty to be indicated subsequently. It was right that the Code should prescribe the penalties for the crimes and not leave them to be determined by the courts, as had been the

(Mr. Calero Rodrigues, Brazil)

case in the 1954 draft Code, or to the internal law of States, as suggested by some members of the Commission.

42. His delegation also agreed with the Special Rapporteur that the Commission itself should propose specific penalties which States could accept as such or could modify when the time came for them to decide on the final text of the Code. However, unlike the Special Rapporteur, his delegation did not think it desirable to indicate a single standard penalty which the judge could reduce in cases of extenuating circumstances. It would prefer the Code to establish a maximum and a minimum penalty, and it would be up to the court, in the light of the circumstances of the case, to determine the actual penalty to be imposed. That was the standard practice in national legal systems. His delegation agreed with the prevailing opinion in the Commission that the death penalty should not be included in the Code.

43. Before analysing the question of penalties, the Special Rapporteur, in his ninth report, addressed issues related to jurisdiction, which had been the subject of extensive discussion, as could be seen from the Commission's report. Taking General Assembly resolution 45/41 as a basis, the Special Rapporteur had distinguished three possible solutions to the issue of jurisdiction: a system of "universal jurisdiction", the establishment of an international criminal court, or the establishment of some other trial mechanism. The latter possibility did not seem to have been seriously considered by the Commission, which was understandable since the expression "other trial mechanisms" was somewhat nebulous. It had, admittedly, been used in the General Assembly, but no examples had been given of what such "other trial mechanisms" might be in practice.

44. The system of universal jurisdiction had been widely used in international instruments, and could conceivably be adopted for the crimes under the Code, but it had some drawbacks, among them the fact that the same crime could have different penalties according to the jurisdiction exercised. It seemed advisable for the time being for the Commission to confine itself to the problems relating to an international criminal court, which was precisely what it was doing. It should be encouraged to follow that course, availing itself of the time during which the draft Code was being considered by Governments.

45. At its forty-third session, the Commission had examined specific aspects of the jurisdiction of a possible court. The question of jurisdiction ratione personae already seemed to have been resolved, since in its current version the draft Code dealt only with the criminal responsibility of individuals. Regarding jurisdiction ratione materiae, his delegation found intriguing the opinion of the Special Rapporteur in paragraph 107 of the Commission's report that "it was better to proceed cautiously and flexibly, starting, for example, by restricting the court's competence to crimes forming the subject of international conventions". That opinion was curious, since it did not seem to be difficult to conceive of a judicial authority applying rules which were not part of the substantive corpus of law in matters within its competence.

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As far as an international criminal court was concerned, the substantive law to be applied had to be contained in international conventions, and first and foremost in the Code. If some international crimes were defined in other instruments but were not included in the Code, the jurisdiction of the court might be extended to cover them, provided that that extension was admitted in the instrument establishing the court.

46. Another question which had been discussed was whether the court should have exclusive jurisdiction or concurrent jurisdiction with national courts. It was extremely difficult for his delegation to accept the view expressed in the Commission and referred to in paragrapn 114 of the report that "States would be free to bring proceedings, either before their own courts or before the international court. The international criminal court would have jurisdiction only in cases where national courts declared they were not competent". As for the possibility of giving the international court competence to review sentences of national courts, it was extremely doubtful that States would be prepared to agree that decisions of their courts, including their Supreme Courts, could be subject to revision outside their own judicial systems. It was, however, true that the attribution of such competence to an international court was theoretically defensible, since national courts would have applied international law, but his delegation's doubts in that regard remained.

47. Paragraph 108 of the Commission's report dealt with the question of "conferment of jurisdiction by States". For proceedings to be instituted before an international criminal court, the agreement of certain States would be required, namely the State in whose territory the crime had been committed, the victim State (or the State whose nationals had been victims of the crime), the State of which the perpetrator of the crime was a national, and the State in whose territory the perpetrator had been found. The Special Rapporteur had indicated that in principle he was opposed to that rule, but he had added that "international realities made it difficult to dispense with it". His delegation hoped that the Special Rapporteur would find support for his position of principle and that he was mistaken in his assessment of international realities. It was encouraging that no member of the Commission had upheld the view that the permission of certain States was necessary for an international court to exercise its jurisdiction when such jurisdiction might in a given case have been established in accordance with an applicable international instrument.

48. The role of States was also considered in subsection (c) of section B of part IV of the Commission's report, entitled "The institution of criminal proceedings (submission of cases to the court)". The title highlighted a distinction which had emerged during the debate and which in his delegation's view should appear clearly in the text. The initiation of proceedings before an international criminal court should be the prerogative of a public organ, as was the case in national judicial systems. Such an organ would have to be created in association with the court. When a State considered that the court should take up a given case, it should bring the facts to the attention of

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that organ (procuracy, parquet) but it should not be entitled to seize the court directly. It should, of course, ensure that the organ in question acted properly in the discharge of its functions, and the court might, for example, hear complaints against its decisions.

49. The Commission had also discussed at some length (paras. 153 to 165 of the report) the question of the respective roles of an international criminal court and of the Security Council in the case of crimes of aggression or the threat of aggression. The debate seemed to have been lively, since the Special Rapporteur had stated that he fully understood the strong reactions to which the issue had given rise. A number of interesting opinions were reflected in the report. In his delegation's view, the question did not call for comment in so far as it concerned the threat of aggression, which it did not consider should be included as a crime under the Code. As for aggression, his delegation noted that the question for the court would be to assign responsibility to an individual for having committed or ordered the commission of an "act of aggression". The "acts of aggression" listed in paragraph 4 of article 15 of the draft Code characterized "aggression", which was defined in paragraph 2 of that article as "the use of armed force by a State". It therefore seemed that an individual could not commit that crime if there was no act of a State. According to the Charter of the United Nations, it was for the Security Council to determine the existence of an act of aggression. It might be doubted whether it was possible for an international criminal court to convict an individual for an act of aggression unless the Security Council had determined that an act of aggression had been committed by a State. The matter merited further reflection in order to arrive at a solution that took into account all its political and legal implications.

50. Mr. CRAWFORD (Australia), after congratulating the International Law Commission on having adopted on first reading a complete set of draft articles forming the draft Code of Crimes against the Peace and Security of Mankind, and paying tribute, in particular, to the Special Rapporteur, said that the issues involved must be confronted by the international community if it was to deal with certain extreme situations adequately and in accordance with the rule of law, which was even more fundamental in criminal than in civil matters.

51. The international community, and therefore the Commission, were facing a dilemma in that area. There was already a body of international criminal law, laid down in more or less widely accepted multilateral treaties, which relied on national courts and institutions for prosecution and punishment, with international cooperation limited to the extradition of suspected offenders and to judicial assistance. As shown by a wide range of cases, such national legal institutions appeared to be working fairly well; where they were not, the appropriate course was to reform them, not to duplicate them at the international level, which would be immensely expensive and complex. Not only would there be a need for international laws and judges, but also for international prosecutors, international penalties, international penal institutions, international rules for remission and parole a vast number of

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institutions and rules, none of which currently existed. One horn of the dilemma related to the undesirability of creating international institutions which encroached on the work of long-established national criminal justice systems or which were costly structures condemned never, or hardly ever, to be used.

52. However, the other horn of the dilemma related to the possibility of the international community being confronted by cases in which national institutions were inadequate or inappropriate, cases in which the horror of the crimes committed was such that the offenders could not be allowed to escape, but in which the relevant national legal systems should not be expected to deal with the situation. The problem was that it was awkward, and contrary to the rule of law, to have to create special structures after the fact to deal with such cases. In short, the international community occasionally needed a mechanism whose creation, in order to meet a merely occasional need, appeared to be inefficient and excessive.

53. The question, however, was what the needs, or at least the categories of need, were. There were three possibilities. The first was the need for a range of internationally acceptable definitions of crimes which were inherently or substantially international in character, and which were crimes against the peace and security of "mankind". The second was the need, expressed by a number of Caribbean countries, for international assistance in dealing with criminals, such as international drug traffickers, who had sufficient resources to put them beyond the reach of a small and isolated criminal justice system. The third was the special need referred to earlier, namely, the necessity of punishing major war criminals, individuals whose offences were on such a scale or who had caused such injury that international action against them was the best way of responding and of ensuring a fair trial.

54. His delegation continued to doubt the utility of the draft Code if its only purpose was to respond to the first of the above-mentioned needs, namely, the development of a comprehensive code of offences which in one way or another threatened international peace and security. In some circumstances there could be merit in defining the crimes which were considered to be sufficiently serious to warrant treatment as crimes against the jus gentium. The jus gentium was perhaps being extended, as evidenced by the elaboration of multilateral instruments relating to crimes of an international character. The need to know the extent of the jus gentium had become apparent in negotiations for the conclusion of extradition treaties. A number of countries believed that, in the case of crimes against the jus gentium, it should not be possible to invoke the political-offence exception to extradition. If that view was to become part of international criminal law practice, then the exact content of the jus gentium must be determinable. If that was the purpose of the Code, there were basic difficulties.

55. The Code overlapped with and repeated internationally agreed definitions of offences already dealt with in international conventions, and it was

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unclear how States parties to the Code would reconcile their obligations under the multilateral treaties to which they were already parties with their obligations under the Code. For example, the Convention on the Suppression and Punishment of the Crime of Genocide required States parties "to provide effective penalties for persons guilty of genocide". The Code itself would prescribe penalties. He wondered whether the two sets of penalties were supposed to match.

56. In addition, the Code did not deal with all aspects of offences referred to in multilateral treaties. For example, article 25 dealing with illicit traffic in narcotic drugs repeated only one element of article 3 (1) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The question arose as to whether the other offences referred to in that Convention should be regarded as lesser offences, even though that was not what the Convention envisaged.

57. The multilateral treaties all recognized the concept of universal jurisdiction in one form or another. He asked whether the Code would affect that by instituting an international jurisdiction based on the principle of territoriality or another principle. The Australian delegation noted, in that connection, that the Special Rapporteur rejected the idea of universal jurisdiction for crimes against the Code. That might not necessarily be a bad solution in the case of provisions dealing with the jurisdiction of an international criminal court, but it was inconsistent with the jurisdictional provisions in the existing multilateral treaties. Lastly, as it currently stood in the draft Code, the list of crimes was not comprehensive if it was intended to reflect the modern jus gentium. While many of the offences included were the subject of multilateral conventions, piracy and hijacking, for example, had been excluded without explanation, although those crimes could affect the peace and security of mankind.

58. With regard to the Code as a form of assistance to the criminal justice systems of smaller States, his delegation understood the problems faced by some States, especially smaller States, in bringing to trial major drug traffickers and other organized criminals. While the matter required further study, Australia was not convinced that the draft Code was the best way of dealing with it. One alternative would be to set up a regional jurisdiction, with cooperative arrangements, for example, in sentencing. An example of such an arrangement was the Pacific Court of Appeal, a panel of judges from the region who sat on appeal cases from countries which did not have a sufficient number of judges or appeals to justify the establishment of a national appellate court.

59. Another potential issue was the need for an established procedure at the international level for dealing with major war criminals, especially those who had committed crimes against the peace and security of mankind, or of a region. Of course, that need would not arise often; however, it was a real one, and it was contrary to the rule of law to create, through retrospective treaties, institutions and rules to deal with such special cases. It was

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necessary to assess whether the need in question was a pressing one and whether the associated costs and difficulties justified creating such a body and such rules at the current stage. The fact remained, however, that if such was the purpose of the draft Code, it should apply only to the most serious international crimes, and any international institution created to give effect to the Code should not be a standing tribunal with permanent staff, because it would have relatively few cases, but a structure capable of functioning when the need arose.

60. The draft Code satisfied none of the possible purposes to which he had just referred. It was not a comprehensive statement of the jus gentium in the area of criminal law. Nor was it always consistent with the existing international criminal law conventions. It did little to deal with the special problem of drug trafficking and organized crime identified by some States. And it was overinclusive in identifying the most serious cases of international criminality. For example, under article 21 every murderer was liable to prosecution under the Code, as was every person who kept someone in a condition of forced labour. The crimes concerned were indeed odious, but that went too far.

61. It was true that there had been some attempt to limit the scope of the draft Code, for example, by limiting some articles to persons who did things "as leader or organizer". But the draft Code went nowhere near defining with sufficient precision the most serious cases of international criminality. A related problem was that of vagueness. It was not enough to limit the Code to serious offences simply by saying, as article 22 did, that it applied only to "exceptionally serious" violations. What exactly did that mean? What impact did that restriction have on the violations listed in paragraphs (a) to (f) of article 22? To take another example, what was "large-scale" drug trafficking under article 25?

62. The draft Code was thus neither a statement of principle nor an instrument of treaty status capable of implementation by States parties. It was in need of substantial further work, as the Commission itself acknowledged in paragraph 173 of its report. In his delegation's view, it was only if a satisfactory consensus could be reached on the issues to which he had just referred that it would be possible to take an articulated position on the following particular questions that had been raised by the Commission and by the draft articles.

63. The establishment of an international criminal tribunal was a separate but related issue. The Commission's commentary foreshadowed a strong link, to the point of determining who should institute proceedings and, in respect of some offences, the possible exclusive jurisdiction of such a tribunal. In Australia's view, it was only if the Code was limited to dealing with major war criminals that the issue of exclusive jurisdiction could arise, and then that jurisdiction could not exclude the jurisdiction of national courts to deal with other offences (such as murder or drug trafficking) involved in the same conduct.

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64. The problem of the relationship to the Security Council was exceptionally difficult. Under constitutional systems based on the separation of judicial power, a central element in an offence could not be left to be conclusively determined by an international executive agency such as the Security Council. It might be that the crime of aggression was one that should be exclusively within the jurisdiction of the proposed international criminal court, although without prejudice to the jurisdiction of national courts to try other offences (for example, murder and violation of the laws of war) that might have been committed in the course of an act of aggression.

65. With regard to penalties, the Commission's commentary suggested that penalty provisions should be included in the draft because the principle nulla poena sine lege so required. Australia could not see that the connection was necessary, unless the Code was intimately connected to a criminal jurisdiction. The existing multilateral treaties dealing with the prevention and punishment of crime managed to do so without specific penalty provisions. But the position would be different in cases where jurisdiction to try the offences under the Code lay with the international criminal tribunal.

66. His delegation had set out a number of specific comments on some draft articles in writing, and copies of the document in question were available to delegations.

67. Mr. MIKULKA (Czechoslovakia) said that following the reading of the draft Code as a whole a number of fundamental questions remained. He wondered, for example, whether the objective of the Code, as it had emerged from the first reading, was overambitious, and whether it was realistic to believe that once adopted the Code would be implemented by States and not remain a dead letter. It was chiefly the responsibility of the Sixth Committee to try to answer those questions, because it was the Committee that determined the political focus of the Commission's work. And it thus also bore some responsibility for the outcome of codification endeavours.

68. Czechoslovakia had always endorsed the idea underlying the Code: that although the criminal responsibility of individuals was based on domestic law the punishment of some crimes perpetrated by individuals was directly governed by international law, independently of domestic law. The crimes in question were chiefly those perpetrated with the consent of the State or upon the State's orders, in other words, they were acts committed by individuals behind whom the State was to be found.

69. Czechoslovakia had always been in favour of the preparation of an international instrument to codify the rules of international law in the area in question and thus contribute to the strengthening of legal safeguards for international peace and security. Over the years, that objective had been expanded to cover some related issues, such as efforts to control international crime in its widest sense, which were of a rather different nature. Their inclusion in the draft had made the subject more cumbersome, since consideration of such different issues called for different methods.

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70. In past years both the Commission and the Sixth Committee had devoted a considerable amount of time to clarifying the topic's key concept - that of a crime against the peace and security of mankind. In deciding to limit the scope of the draft to acts by individuals, the Commission had taken a major step in the right direction. That approach by no means disregarded the dual nature of the issue: that a crime committed by a physical person could at the same time constitute an illicit act by the State. However, it was only by separating the criminal responsibility of individuals from the responsibility of States that the complex subject-matter in question could be dealt with and codified.

71. At its most recent session, the Commission had decided that all the articles on the various types of crimes should be preceded by a chapeau specifying the categories of physical persons to which each article applied, thus responding to the proposals made in the Sixth Committee by many delegations, including the Czechoslovak delegation. Differentiation on a case-by-case basis seemed to be an appropriate solution, although Czechoslovakia did have some reservations about the scope of some articles. As history had demonstrated, some crimes against the peace and security of mankind had been perpetrated by individuals who had used the public authority conferred on them, in other words, by agents or representatives of the State. Such individuals had either abused their power or acted in accordance with the policy of the State in question, whose goals were in that case contrary to international law. However, it was not always possible to equate an individual with public authority on the basis of the duties of the individual concerned within the State apparatus. It would suffice, in that connection, to recall the case of Nazi war criminals, many of whom had in fact exercised power without actually performing official duties. He believed that it was that problem that the Commission had attempted to solve in the chapeaux of articles 15 (Aggression), 16 (Threat of aggression), 17 (Intervention) and 18 (Colonial domination). Those articles, unlike articles 23 and 24, did not refer to agents or representatives of the State but to individuals acting as leaders or organizers.

72. Likewise, articles 19 (Genocide) and 21 (Systematic or mass violations of human rights) did not limit the potential perpetrators of the crimes in question to agents or representatives of the State, since they referred to "individuals". That was precisely where the problem of drawing a distinction between crimes against the peace and security of mankind and crimes under ordinary law arose. Clearly, the solution to that problem could not be based on a more precise definition of the categories of individuals likely to commit such crimes. He wondered, therefore, what the criterion should be for drawing such a distinction. The Commission suggested the criterion of a "mass scale" or the "exceptional seriousness" of the acts in question. He was, however, not convinced that that was a satisfactory response.

73. With regard to the dual nature of crimes against the peace and security of mankind, which arose from the fact that such crimes were committed by individuals but also involved the State, he said that in cases where they were

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committed by agents or representatives of a State in the exercise of public authority, such crimes were directly imputable to the State. The situation was different in the case of crimes such as genocide or massive and serious violations of human rights committed by individuals who were not agents or representatives of the State, did not occupy any position within the State apparatus, were not exercising any prerogative of public authority, and therefore acted on their own account. The connection between crimes committed by private individuals and the State became apparent only in certain situations, e.g. when the State under whose jurisdiction the crimes had been committed failed consistently to discharge its obligation to suppress them in the widest sense of the term and, therefore, bore international responsibility for those crimes.

74. At the same time, if the State concerned was not failing in its obligation to suppress such crimes, the crimes - even if massive or serious - still remained crimes in ordinary law and should not be included in the category of crimes against the peace and security of mankind. That important aspect of the problem had not always been sufficiently explored and, despite all the improvements made in the draft, had not found adequate expression in the text. Of course it was not easy to bring out that aspect of crimes against the peace and security of mankind in each of the articles. The solution might lie in inserting a general provision that would supplement articles 1 and 2 of the draft and, in consequence, would define the scope of the draft more precisely while at the same time casting further light upon the interdependence between the draft Code and the draft articles on State responsibility.

75. Turning to the questions which the International Law Commission had discussed in connection with the Special Rapporteur's ninth report, he noted that the Commission had first considered the problem of applicable penalties. The Special Rapporteur was right in thinking that the draft Code needed to be supplemented by provisions relating to applicable penalties in accordance with the principle nulla poena sine lege while at the same time drawing attention to the difficulty which the undertaking entailed and which had already come to light in connection with the elaboration of the Charter of the Nürnberg Tribunal.

76. Draft article Z on applicable penalties presented by the Special Rapporteur proposed a simple solution to a complex problem. He doubted whether the introduction of a standard penalty was appropriate, not only in view of the diversity of the crimes covered by the Code but also in the light of the precedent constituted by article 27 of the Charter of the Nürnberg Tribunal. The question of the applicability of the death penalty was a separate problem. Although the Czech and Slovak Federal Republic had recently abolished the death penalty, he by no means underestimated the difficulties which its complete exclusion in the case of crimes against the peace and security of mankind might raise for countries whose legislations did provide for the death penalty, particularly if the system of universal jurisdiction were adopted. The question required more thorough consideration. So far as

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paragraph 3 of article Z was concerned, he shared the views of Commission members who had criticized it. Restitution of illegally appropriated property by the perpetrator of the crime fell outside the scope of the subject of penalties and should be dealt with separately.

77. The solution to the problem of penalties was to a large extent connected with the question of the mechanism of the Code's implementation. If implementation were to be based upon the concept of "universal jurisdiction", it would be possible, instead of providing specific penalties for each of the crimes and thus facing the sometimes insurmountable difficulties involved in reconciling the contradictory concepts inherent in different legal systems, to follow the approach adopted by the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, in which States undertook to make such offences punishable by severe penalties or by penalties similar to those imposed in the case of any ordinary offence of a serious nature. A similar approach was embodied in the International Convention against the Taking of Hostages and in the Convention against Torture. The approach respected the diversity of penalties existing in different systems of penal law and, at the same time, introduced an element of standardization of the action taken by national courts.

78. A different situation would arise if the implementation of the Code or of part of the Code were to be conferred on an international jurisdiction. In that case, a standard system of penalties would be necessary for the purpose of inclusion in the Code.

79. The idea of the establishment of an international jurisdiction had received new encouragement at the forty-fifth session of the General Assembly. The coming years would show whether that had been a spontaneous reaction in response to a specific crisis or whether the declarations made by States had reflected a more consistent trend towards the establishment of an international criminal court.

80. His delegation took the view that the historic occasion now presenting itself should not be missed, and that the possibility of establishing an international court should be given serious consideration. The Sixth Committee should give a very clear lead to the International Law Commission on that point. He was prepared to go still further and say that, in order to avoid the risk of eroding of the authority of the Code as a result of divergent practices by national tribunals, it was necessary to give serious consideration to the possibility of conferring jurisdiction upon the international court, at least with regard to the crimes of aggression, threat of aggression, intervention, colonial domination and apartheid, or in other words in those cases where the determination of an individual's criminal responsibility was subject to an assessment of an act committed by a State at the international level - an assessment which national courts could perform only with great difficulty. The proposal made by some members of the Commission to the effect that the implementation of the articles relating to those crimes should be conferred on the international criminal court while

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that of the rest of the articles should be entrusted to national courts under universal jurisdiction was of interest in that connection.

81. As for the jurisdiction of the court, it should be established by the adoption of the court's statute and should ipso facto be binding upon all States parties to the statute. Adoption of the draft provision on the conferment of jurisdiction proposed by the Special Rapporteur would entail the risk of making the court powerless to deal with the most flagrant crimes - those committed with the consent or upon the orders of a State by its own agents or representatives perpetrating their crimes - such as, for example, the crime of ordering aggression or intervention to be committed - under that State's territorial jurisdiction. The provision would run counter to the historic examples of the Nürnberg and Tokyo Tribunals.

82. The Commission had also embarked upon a highly interesting debate on a draft provision concerning criminal proceedings which sought to make such proceedings subject to prior determination by the Security Council. While it could not but recognize to the logic of the legal arguments advanced against that idea, his delegation wished to emphasize that, whatever the solution adopted, it should not allow the procedure for instituting proceedings before the court to become a means of escaping the provisions of the Charter concerning the prerogatives of the Security Council to determine the existence or threat of an act of aggression. Any solution which endangered the balance of competences in the sphere of international peace and security set forth in the Charter would be a disservice to the cause of international peace. The establishment of an international criminal court would strengthen the system of collective security based upon the Charter only provided that the court was integrated in that system and that the existing checks and balances were preserved.

83. Ms. SZAFARZ (Poland) said that when evaluating the draft Code of crimes against the peace and security of mankind it was necessary to bear in mind that most of its provisions concerning specific crimes were only a reflection of the generally binding customary rules of international law having, in some cases, a jus cogens character.

84. Her delegation fully recognized the importance of the list of crimes against the peace and security of mankind incorporated in the draft Code. In general, it also endorsed the present definitions of specific crimes. The subjective elements forming part of those definitions, such as the expression "good reason" in article 16, "large-scale destruction" in article 22, paragraph 2 (e), "as to create a state of terror in the minds" in article 24 and "on a large scale" in article 25, paragraph 1, probably had to be accepted, but every effort should be made to provide adequate procedural safeguards.

85. The bracketed words "under international law" in draft article 1 should be included in the text, for the simple reason that, as was clear from article 2, crimes against the peace and security of mankind were, first and

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foremost, crimes under international law. Draft article 15, paragraph 5, which was currently between brackets and which read as follows: "Any determination by the Security Council as to the existence of an act of aggression is binding on national courts" should also be retained. However, depending on what decision was taken in that connection, it would be advisable to refer to an international criminal court instead of or as well as to national courts.

86. Moreover, it seemed appropriate to provide that, in principle, any individual who committed an act which constituted an attempt to commit a crime against the peace and security of mankind would be responsible therefor and would be liable to punishment. The bracketed phrase in article 3, paragraph 3, could no doubt refer to the articles of the draft Code relating to specific crimes. The gravity of all those crimes justified punishing an attempt to commit them in many cases.

87. As to draft article 14, her delegation was of the view that defences such as mental incapacity and extenuating circumstances, if any, should always be taken into consideration.

88. With regard to the issue of penalties, it would be desirable to have the definition of each crime accompanied by the relevant penalty. That would have the advantage of being more explicit than a scale of penalties applicable to all crimes. Having said that, even the best code, even one that listed the penalties incurred, would be useless and even illogical without a mechanism for implementing it. For that reason, her delegation wholeheartedly supported the idea of establishing an international criminal court which would have competence solely for crimes defined in the draft Code.

89. The argument that establishing such a court would be too costly an undertaking was not convincing; if the mere existence of the court could deter potential perpetrators from committing the crimes enumerated in the Code, then the material and other benefits of establishing it would outweigh any cost.

90. The competence of the future international criminal court could be exclusive in the case of crimes against the peace, and concurrent with national courts in that of crimes against the security of mankind. All States parties to the statute of the court would be entitled to institute proceedings in it. The statute of the court would be contained in a protocol annexed to the convention concerning the Code. Finally, the preventive role of such a court could be even more important than its role in the area of repression.

91. Finally, concerning draft article 24, there was no justification for terrorist actions, and they should be prevented and suppressed. Terrorists should be extradited immediately to the State whose interests or citizens were affected. Naturally, that was an ongoing and very difficult undertaking, but a civilized approach and a concerted action by all States would make it possible to achieve in the best interest of each State and of the international community as a whole.

92. Mr. SCHARIOTH (Germany) pointed out that, when considering the content and overall structure of the draft Code, it was necessary not to lose sight of the Code's purpose. The draft Code was not just another attempt at codifying certain particularly serious acts prohibited under international law; its aim was to permit the prosecution and punishment of individuals who perpetrated crimes that were of such gravity that they affected mankind as a whole. It was being worked out with a view to being applied by the international community through an international mechanism which should take the form of an international criminal court. If such an international mechanism was to become effective and workable, the Code must be confined to offences which, in general international practice, were unequivocally regarded as crimes against humanity.

93. Part II of the draft code, however, listed a whole series of offences. Some of them, for example, genocide, systematic or mass violations of human rights, environmental crimes or the war crimes listed in article 22, were indeed of a most serious nature; others, however, were not.

94. It went without saying that, like all penal law, the code must be phrased in precise terms and must contain safeguards against arbitrary application, because the consequences of such arbitrariness could be most serious for the persons involved.

95. His delegation welcomed the fact that the Commission had expressly qualified the perpetrator of aggression, intervention and colonialism or alien domination as being a "leader or organizer". Other provisions, however, aimed at any "individual who commits or orders the commission of" certain acts. Considering the excessively broad wording of the provisions of article 3, paragraphs 2 and 3, concerning complicity and attempt, personal liability to prosecution under the draft would appear to be almost limitless. That, however, ran counter to the intended purpose of the draft code. In order to be both acceptable to as many States as possible and workable for a future international criminal court, the code should concentrate on punishing the real leaders or organizers.

96. And yet doubts remained even concerning the articles directed expressly against "leaders". For example, article 20 on apartheid also made certain legislative measures punishable. History had shown that the adoption of such legislation was not necessarily the doing of one leader but might take the form of regular parliamentary acts. It was hard to imagine how an entire parliament or administration enacting such legislation could be punished in the real world.

97. Ambiguities still remained concerning the relationship between international treaty law and certain draft articles. Several crimes listed in the draft code had already been dealt with in certain international treaties, for example, genocide, torture or the laws of war. Some of those treaties, however, had not yet been ratified by all States. Thus, opinion as to what constituted an "unlawful weapon", for example, in the sense of article 22 might vary depending on whether or not a State had ratified a given treaty.

(Mr. Scharioth, Germany)

The present draft code did not indicate how such discrepancies could be handled.

98. His delegation welcomed the fact that the Commission had addressed the issue of an international criminal jurisdiction. As to whether the mandate given to the Commission on the subject was clear enough to enable it to work out and submit a whole set of draft articles on the statute of an international criminal court, he pointed out that any criminal law, if it was to become effective, must be accompanied by an enforcement mechanism. Early attempts to address the question, which dated as far back as 1954, had simply been deferred until such time as, inter alia, the draft code of crimes would be finalized. Now that the Commission had completed its first reading of the draft code, the General Assembly should give it a clear mandate to elaborate concrete proposals for the statute of an international criminal court.

99. Turning to chapter VIII of the Commission's report on the work of its forty-third session, he noted with satisfaction that in paragraph 334 the Commission had at least partly endorsed his delegation's suggestion regarding the need to make wider use of article 16 (d) of the Commission's statute, in other words to establish small working groups to work with the Rapporteur on the preparation of drafts. It continued to believe, however, that the increasing complexity of the issues before the Commission and the growing need for speed made it highly advisable to divide work more evenly among the 34 members of the Commission, perhaps by appointing two Co-Rapporteurs for each topic in addition to the Special Rapporteur.

100. With regard to the Commission's long-term programme of work, his delegation agreed with the Chairman of the Commission that it was appropriate to start already considering what further topics were suitable for inclusion in the Commission's agenda since that discussion would take time. His delegation would be interested in hearing the views of other States on whether it would be worthwhile for the Commission to take up certain questions of treaty law that were not covered by the Vienna Convention on the Law of Treaties, for example, the consequences of objections to inadmissible reservations.

101. Mr. AL-BAHARNA (Bahrain) said that he fully concurred with the views expressed in paragraph 78 of the report (A/46/10) concerning the inclusion of penalties in the draft code as opposed to a procedure whereby the court or the internal law of States would determine the penalty to be imposed. He could not easily accept the argument that it would be preferable not to seek to impose uniform sentences in a heterogeneous world. Once the international community had recognized the existence of international crimes, to deny the need for uniform penalties would be a step backwards and would undermine the effectiveness of the code. The anxiety felt by the supporters of that argument should be somewhat allayed if the Commission, instead of opting for one rigid penalty, established a system of different penalties. His delegation believed that to impose a single penalty for all crimes would be unrealistic and unethical. For similar reasons, it seemed to his delegation that a series of penalties, rather than a single penalty, should be prescribed

(Mr. Al-Baharna, Bahrain)

for every crime, along the lines suggested by the Special Rapporteur in footnote 298 on page 213 of the report, with a minimum and a maximum being specified in each case.

102. With regard to the type of penalties to be imposed, while he felt that the point of view of those who favoured the abolition of capital punishment on the ground that no one had the right to take another's life was extreme, he recognized that the Commission could hardly ignore the developments in public opinion on the subject, which appeared to have shifted in favour of abolition. His delegation would have no hesitation in supporting a system of penalties including life or temporary imprisonment, provided, of course, that the possibility of a partial remission or a reduction of sentence upon review by an international board, and an appeal system, were not precluded. The lack of provisions on that subject might undermine confidence in the court. With regard to confiscation, only bona fide property belonging to the accused could be lawfully confiscated. Moreover, where the accused was serving a life or an extended sentence, the total or partial confiscation of his property might not be desirable, as his dependants would suffer. It would be useful for the Commission to re-examine that point.

103. The Commission had adopted an innovative approach in recommending the penalties mentioned in paragraph 98 of the report. However, his delegation could not agree with the view that it was difficult to draw a line between community service and forced labour.

104. The new versions of draft article Z (fn. 298) prepared by the Special Rapporteur represented an improvement to the extent that they took into account the views expressed by members of the Commission. His delegation preferred the second version, although it had some reservations. First, the precise extent of life imprisonment should be clearly stated. Secondly, the Commission should carefully reconsider all the ramifications of the total and partial confiscation of property in order to evaluate its utility as a penalty. Thirdly, the question of the deprivation of civil and political rights should be more thoroughly explored. Some of the problems mentioned in connection with confiscation should also be re-examined in that context. In the meantime, it was difficult for Bahrain to comment on that provision.

105. He noted with satisfaction that the Commission was gradually beginning to recognize the need for an international criminal court. With regard to the jurisdiction ratione materiae of the court, the Bahraini delegation did not support its establishment by reference to a list of international crimes based on existing multilateral conventions, as that would depart from a global perspective. A provision which emphasized the need to standardize and to universalize international criminal law would be preferable.

106. In principle, it would be ideal for the court to be directly vested with exclusive jurisdiction. However, if the conferment of jurisdiction by States was to be retained out of concern for a realistic approach, priority should be given to the State which could demonstrate that, without its consent and participation, the trial would be meaningless. In certain circumstances, that

(Mr. Al-Baharna, Bahrain)

would not be the territorial State but the nationality-of-the-victim State, or another State. Where more than one State could demonstrate "essential status", all should confer jurisdiction.

107. Although exclusive jurisdiction might be optimal, the advantages of concurrent jurisdiction, which were mentioned in paragraph 114, should not be ignored. While the specific conditions under which such jurisdiction would operate should be further developed, caution was required, as there were no models to follow.

108. With regard to the court's power to determine its jurisdiction, that was an inherent right of every court, whether or not it was expressly provided for in its constituent instrument. The question of appeals against sentences was not discussed in the report. That was a gap which must be filled. While agreeing that the court should be given the power to review sentences passed by national courts, his delegation recognized that such a proposition created legal and political difficulties. Bahrain agreed with the view stated in paragraph 132 of the report that the clause granting to the court the competence to interpret international criminal law would contribute to the clarification and the unification of such law.

109. The views expressed in paragraphs 154 to 157 of the report as to whether the institution of proceedings before the court should be contingent on a prior determination by the Security Council were interesting and some of them could be taken into account on second reading. Nevertheless, he wondered whether such a rule would not affect the independence of the court and whether the unanimity rule applied by the Security Council would not curtail the court's powers. Moreover, there was no such provision in the Statute of the International Court of Justice and it was hard to see the rationale for departing from that precedent.

110. Mr. PAL (India) said he believed that it was premature to deal with the question of penalties before having settled on the crimes to be included in the future Code of Crimes against the Peace and Security of Mankind. However, in view of the gravity of those crimes, the most exemplary punishment available in any given country should be selected.

111. The question of the custody of the property in the possession of a convicted offender was a matter of detail which could be settled later. The most obvious solution would be to restore such property to its rightful owners or to their heirs. In the absence of owners or heirs, the property could be placed in a trust or given to the State of the convict's nationality. There could also be other options. Whatever the option chosen with regard to the jurisdiction of an international criminal court - first-instance jurisdiction on issues of law and conflicting claims only; review competence in respect of sentences imposed by national courts; exclusive jurisdiction for some claims and review competence for others; or concurrent jurisdiction with national courts - such jurisdiction must be based on the consent of the States parties to the statute of the court which were directly concerned with the crimes being tried.

(Mr. Pal, India)

112. The question of the priorities to be established among multiple jurisdictions which could be exercised over the accused on the basis of different principles also required careful analysis.

113. The establishment of an international prosecutor's office, equipped with all necessary means of gathering evidence and deciding whether the case should be tried by a court, was of decisive importance. With regard to the question whether, in the case of crimes of aggression or the threat of aggression, the proceedings before the court should be subject to a prior determination by the Security Council of an act or threat of aggression, a problem could arise if the Security Council was unable to decide. Furthermore, it was advisable not to provide for the possibility of a case being brought before the court by indirect means; that should be the sole prerogative of the international prosecutor's office which, in turn, could serve as a safeguard of the balance between the court's jurisdiction and the Security Council. The court could be given the option of requesting advice from the Security Council which, however, would be solely in the nature of a recommendation; the Security Council could also seek advisory opinions from the court.

114. Lastly, his delegation supported the text of article 11 stating that the fact that an offender had acted pursuant to an order of a Government or a superior did not relieve him of criminal responsibility if, in the circumstances at the time, it had been possible for him not to comply with that order.

115. Mr. PUISSOCHET (France) said that the current wording of article 3 of the draft Code of Crimes against the Peace and Security of Mankind, which covered only individual responsibility, was reasonable. It was understandable that some members of the Commission should have wished to deal with situations in which the individual acted in the name of the State, but involving State responsibility would mean defining a regime which, because it was quite different from that envisaged for entailing the responsibility of the individual, could not be encompassed by the draft Code.

116. With regard to aggression, the question of the respective roles of the Security Council and a criminal jurisdiction must be completely clarified, but the views expressed in the Commission were still widely divergent. The Commission should therefore continue its consideration of that point during the second reading in the light of the comments by States.

117. Crimes against the peace and security of mankind must be characterized by a special degree of horror and barbarity and be of such a nature as to truly undermine the foundations of human society. However, the draft extended that concept to acts which did not all obviously belong in that category, a fact which had two unfortunate consequences: (a) the concept of a crime against the peace and security of mankind was devalued and (b) it became much more difficult to establish an international system for the punishment of extremely diverse acts.

(Mr. Puissochet, France)

118. It would be unwise to consider failure to respect rules established in treaties or resolutions of the General Assembly of the United Nations as systematically constituting a crime against the peace and security of mankind, for that would distort the scope of the draft Code and entail interference with matters dealt with elsewhere, such as for damage to the environment and war crimes.

119. With regard to war crimes (art. 22), the Commission had decided that the article should cover only acts which it considered exceptionally serious. Nevertheless, even though that approach defined the problem more effectively, his delegation considered that war on the one hand and crimes against the peace and security of mankind on the other belonged in different categories. Furthermore, the proposed list seemed to need further attentive scrutiny. The Commission should, in particular, determine whether it might not be premature to consider as a crime against the peace and security of mankind the violation of certain rules which were currently embodied in treaties and concerned questions still being studied by States. In that connection, his delegation wished to reserve its position on subparagraph (d) in so far as it reproduced word for word a provision of Protocol I of 1977. Furthermore, the reference in that subparagraph to collateral damage to the environment did not seem to be in harmony with article 26, which referred only to wilful damage. His delegation doubted whether the Commission could validly formulate in the draft Code substantive rules on the conduct of military operations. Such rules, whether relating to the protection of the environment, of civilian property or of property of religious, historical or cultural value, required special studies in the light of their purpose. That was a point which the Commission should clearly consider further. That observation was particularly relevant in the case of the wilful and severe damage to the environment referred to in article 26. It was open to question whether a problem of such magnitude could be dealt with in a brief text which left unanswered a number of questions such as the context in which such damage was caused (international armed conflict or purely internal action) and the way in which a judgement as to the nature of the acts committed might be influenced by the means used or the aim pursued.

120. With regard to the creation of an international criminal jurisdiction, it would be unwise at the current stage to consider only one option. Barring certain solutions which could already be set aside (for example, the creation of an international court which would hear appeals from national courts), the Commission could give the matter fairly wide-ranging consideration. The competence of the court should not encompass acts which were serious and condemnable but did not really constitute crimes against the peace and security of mankind. The question of whether the crimes should be defined in the code itself or in an annex to the statute of the court was purely formal, for it would be difficult to imagine that such an annex would not reproduce the provisions of the Code.

121. The report of the Special Rapporteur implicitly established a court which would have concurrent jurisdiction with national courts. That was a

(Mr. Puissochet, France)

compromise position which avoided posing the very sensitive question of national sovereignty in the judicial domain, but which also had obvious drawbacks. The international court would intervene only if national courts had declared that they lacked competence, but it might be wondered what would happen if the case had not been referred to the national court or had been referred to it only after the international court had been seized of the matter. Moreover, such a system would almost inevitably lead to conflicts of judicial practice on the same questions and might greatly delay the outcome of the proceedings.

122. The solution of conferring exclusive competence on the international court would not be easy to implement, for it would clash with the differences between legal systems and with the desire to preserve their sovereignty. It did, however, have the advantage of appearing to be a coherent solution, at least at the theoretical level.

123. Other possible solutions had appeared which might be more pragmatic. One consisted in defining the competence of the court differently according to the crime concerned: it would have exclusive competence in some cases and concurrent competence in others. In order to form an opinion, one would have to know how the two categories were to be differentiated and what advantages the system was expected to offer. The second possibility consisted in envisaging not the creation of a single court but of ad hoc criminal courts, which might be easier to set up. That was an option which deserved further consideration.

124. With regard to the territorial competence of the court and acceptance of its compulsory jurisdiction, there seemed to be two conflicting schools of thought. According to the first, which sought to be realistic, the territorial criterion played a key role: the court would rule on crimes committed in the territory of a State party to the convention creating the court and the consent of that State - to be expressed on a case-by-case basis - would be necessary. According to the second school of thought, the crimes were considered as being directed not only against a State but against mankind as a whole and therefore of concern to the entire community of States. Consequently, no State should be granted privileged status and the court should be able to intervene without the consent of the State in whose territory the crime had been committed or the State of which the perpetrator of the crime was a national. At the current stage it was difficult to choose between the two approaches. The second seemed to be logical, but it had to be acknowledged that it did not really correspond to the realities of international life. The point should be considered further.

125. It would be dangerous to establish a system which had been insufficiently thought out and which thus would not really improve the system for the punishment of the most heinous crimes and might even discredit the very idea of international justice. His delegation congratulated the Commission and its Special Rapporteur for having provided valuable material for study and would follow the future work with great interest.

The meeting rose at 6.05 p.m.

UNITED NATIONS

General Assembly

FORTY-SIXTH SESSION

Official Records

SIXTH COMMITTEE
30th meeting
held on
Wednesday, 6 November 1991
at 10 a.m.
New York

SUMMARY RECORD OF THE 30th MEETING

Chairman: Mr. AFONSO (Mozambique)

later: Mr. SANDOVAL (Ecuador)
(Vice-Chairman)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 128: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-THIRD SESSION (continued) (A/46/10, A/46/405)

1. Sir Arthur WATTS (United Kingdom) welcomed the Commission's draft articles on the draft Code of Crimes against the Peace and Security of Mankind, which, while not yet complete, would enable the Committee to see the overall direction in which the Commission's work was moving. The importance of international criminal law was universally recognized and its development was an important contribution to the maintenance of international peace and security. Consequently, in order to be of real value, the draft Code should add something to the existing law and the work of the Commission was a constructive effort in that direction.

2. Turning to the draft articles themselves, he noted that article 11 provided that the mere fact of having acted pursuant to an illegal superior order was no defence against criminal responsibility for the illegal act so committed. It also provided that an accused was relieved of criminal responsibility if, "in the circumstances at the time", it was not possible for him to disregard the illegal order. Such a broad formulation of the exception risked undermining the draft Code and needed to be examined in much greater depth.

3. Part II, which defined the scope of the draft Code, no longer maintained the usual distinction between crimes against peace, war crimes and crimes against humanity. Instead, it sought to draw distinctions between three groups of crimes, based partly on the nature of the crime and partly on the degree of involvement of senior officials of a State. His delegation would need to look at the new approach very carefully in order to satisfy itself that such distinctions were valid and practical.

4. Article 19 dealt with the crime of genocide, which was an essential part of any code of international crimes. The text was correctly based on the Convention on the Prevention and Punishment of the Crime of Genocide and his delegation supported the Commission's reluctance to broaden the concept of genocide to cover other nominally similar, but in substance very different, concepts.

5. His delegation was not convinced that article 22, dealing with exceptionally serious war crimes, was a necessary or workable provision. The crimes listed were, generally speaking, either grave breaches of the 1949 Geneva Conventions or well-established crimes under other international humanitarian law. It was questionable whether an attempt should be made to prescribe a hierarchy of such crimes.

6. The question of means of warfare intended to cause damage to the environment, which was dealt with in articles 22 and 26, had been included in

(Sir Arthur Watts, United Kingdom)

the Committee's agenda and would also be considered at the International Conference of the Red Cross and Red Crescent later in the month. The Commission might wish to consider those developments carefully before deciding how, if at all, it should cover the matter in the draft Code.

7. On the question of penalties, his delegation accepted the desirability of having a degree of consistency in the penalties imposed for breaches of the Code. It did not believe, however, that that necessarily required at there should be mandatory sentences, particularly those that specified a imum term of years of imprisonment, including life imprisonment that allowed for no possibility of parole. A cardinal principle of his country's criminal law, and one that was shared by many other systems, was that each convicted person should be treated individually even though the punishment should also take into account the grave nature of the offence. If agreement could be reached on the establishment of an international criminal court, such a body could help in establishing a degree of consistency in sentencing policy. Any consideration of penalties must also take account of certain practical aspects. To the extent that penalties were imposed by national courts, many, though not necessarily all, practical matters would be resolved within the framework of national laws. Since the Commission was dealing with major international crimes, it would not be right to leave all questions relating to the enforcement of penalties to be dealt with at the national level. Moreover, since the Commission envisaged the possibility of an international criminal court, the question of some international involvement in the practical enforcement of penalties assumed much greater importance.

8. Following the valuable discussions held on the subject during the Commission's forty-third session, the Special Rapporteur had proposed draft provisions on two major issues on which he needed guidance in drafting a possible statute of an international criminal court. The first of those issues concerned the jurisdiction of such a court, while the second concerned the question of who should institute proceedings before the court. In view of the difficulty encountered during the discussion of those issues, the Commission needed to address the question of whether the establishment of an international criminal court would mark any significant practical improvement on the existing situation. For many international crimes there was already an elaborate though largely ineffective system of universal jurisdiction. In numerous cases grave breaches had occurred where those responsible had not been brought to justice. Most often, the alleged offenders were protected by their own authorities, which might well have ordered the commission of the offences. His delegation wondered whether there were reasonable grounds for believing that having an international court would improve matters.

9. It was perhaps not necessary to envisage a system in which all the crimes identified in the draft Code had to be referred to an international criminal court. There could be a mix of States exercising universal jurisdiction for some crimes, and an international criminal court to deal with such crimes as acts or threats of aggression. Limiting the jurisdiction of such a court to a

(Sir Arthur Watts, United Kingdom)

narrow range of crimes might make it easier to deal with the complex problems faced by the Commission. At the same time, the Commission might wish to examine ways in which the system of universal jurisdiction might be made more effective.

10. In view of the enormity of the task faced by the Commission on a subject that was at the outer edge of its mandate to promote the progressive development of international law and its codification, the Commission should perhaps wait until it had a specific request from the General Assembly before embarking on further work. In his delegation's view, the problems were as much of policy as of law and the new Commission should be given clearer policy guidance before it proceeded further. The question of the establishment of an international criminal court should therefore not be considered by the Commission at its forty-fourth session. Instead, States should be requested to provide their views on the Commission's work on that aspect of the topic, not later than 1 May 1992. On the basis of those comments the Committee could then decide how best to proceed.

11. Mr. ALVAREZ (Uruguay), said that, while the draft Code of Crimes against the Peace and Security of Mankind was very valuable and comprehensive, the question of an international criminal court and that of penalties required further deliberation. International criminal law, whether applied by an international criminal court or by the competent judicial organ of a given country, should prescribe concrete penalties in order to provide clear guidance to the jurisdictional organ. It would be very difficult to establish a general penalty to be applied by all Member States. If, on the other hand, the exclusive competence of the organ of domestic jurisdiction were recognized, the principle nulla poena sine lege might not be respected. Moreover, no judge would condemn a criminal in the absence of a rule which defined the penalty clearly.

12. On the question of an international criminal court, the arguments presented by the Special Rapporteur and the comments made by delegations should be of use in drafting a text as an integral part of the draft Code or as an additional protocol thereto.

13. His delegation welcomed the changes made in part II, "Crimes against the peace and security of mankind". The characterization of crimes in the current draft was more in line with modern thinking in that area and was more acceptable than the weak and vague earlier draft.

14. In chapter I, "Definition and characterization", the provision that the characterization of an act or omission as a crime against the peace and security of mankind was independent of internal law constituted a clear message to national judges and embodied in a text the most widely accepted doctrine on the matter.

(Mr. Alvarez, Uruguay)

15. In chapter 2, "General principles", the solution adopted with respect to the definition of "attempt" was correct, although his delegation had some reservations concerning the treatment of the various forms of participation in the commission of a crime against the peace and security of mankind enumerated in article 3, paragraph 2. His delegation also hoped that article 9, "Non bis in idem", would be amended according to whether or not an international criminal court was established. The solution proposed in paragraph 4 of the article was unsatisfactory since the text was confusing and did not set out clearly a conflict of competence between internal and international jurisdictions. Moreover, it did not accord with the legal philosophy of article 2. His delegation was in favour of article 10, on "Non-retroactivity".

16. With regard to the crime of aggression (art. 15), a prior determination by the Security Council of that act as constituting an act of aggression should not be required in order for the appropriate jurisdiction to take action. Nevertheless, in view of the special characteristics of the crime of aggression, his delegation would not object to the elaboration of such a system, since the institution of pre-judicial procedural questions was part of Uruguay's juridical system and did not imply interference in the activity of the jurisdiction, which was sovereign and independent during the other stages of the procedure.

17. His delegation had serious misgivings concerning article 24. It failed to understand why an individual committing the crime of international terrorism had to be an agent or representative of a State. Moreover, it seemed ill-advised to elaborate an article on the crime of terrorism at a time when there was no agreement within the international community on the concrete definition of the phenomenon of terrorism.

18. That criticism also applied to the crime of mercenary activity, since the classification in article 23 differed from that in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Such a departure from the text of the Convention was surprising, particularly since the wording of the Convention had been scrupulously followed in respect of the other elements of the definition. There seemed to be a contradiction between paragraph 1 of article 23, which referred to an individual action or "an agent or representative of a State", and paragraph 2, which referred in broad terms to "any individual".

19. The observations it had made notwithstanding, his delegation retained the greatest interest in the topic and wished to record its satisfaction at the considerable work completed by the Commission in such a short period.

20. Mr. YAMADA (Japan), speaking on the draft Code of Crimes against the Peace and Security of Mankind, said that since the Commission and the General Assembly had been addressing the topic for almost half a century, the completion of the first reading of the draft articles was a major step towards the establishment of an international control mechanism for such crimes.

(Mr. Yamada, Japan)

However, many parts of the draft Code required further examination in the course of the second reading. His delegation therefore hoped that, as a basis for future deliberations, each Member State would submit useful comments and suggest guidelines based on its own position.

21. Turning to the draft articles, he commended article 22, which represented a compromise between two divergent views among members of the Commission, one of which favoured the inclusion of an indicative or enumerated list of crimes, while the other favoured a general definition on the grounds that it would be difficult to reach agreement on the specific crimes to be enumerated and that the crimes to be listed could change as time went by. It would be advisable to consider further the relationship between article 22 and the relevant articles of the Geneva Conventions, since the war crimes covered by article 22 included new elements, such as injury to the environment, and differed from the grave breaches covered by the Geneva Conventions and the Protocols Additional thereto.

22. Further deliberation was required on articles 15 and 16, in order to clarify the relationship between the role and authority of political organs, such as the Security Council, and the role and authority of national courts or of the international criminal court envisaged in the draft Code. Deliberations on coordinating the respective roles of the two sides were also desirable.

23. The Commission had recognized the desirability of establishing clear provisions on systematic penalties based on the principle nulla poena sine lege, but had experienced great difficulties in formulating such provisions because of the diversity among internal legal systems. Overcoming those difficulties was one of the most important challenges facing the Commission.

24. Some of the other provisions of the draft articles deviated from the original aim of the draft Code, which was confined to strictly defined crimes. Article 17, for example, provided that "fomenting [armed] subversive ... activities" was a constituent element of intervention. If the bracketed word "armed" were deleted, however, the resulting term, "fomenting subversive ... activities" would cover an excessively wide range of acts and might cause problems in the future. As another example, the scope of the crimes covered by article 25, "Illicit traffic in narcotic drugs", was made unclear by the inclusion of the term "on a large scale".

25. The basic view of his delegation on the draft Code was that an international mechanism was essential for directly prosecuting the perpetrator of such acts as aggression, possibly through the establishment of an international criminal court. Consequently, his delegation was pleased to note that, at the 1991 session, the Commission had again addressed the question of setting up such a court. The Commission should continue its efforts to coordinate the divergent views of countries and thus establish a

(Mr. Yamada, Japan)

mechanism to ensure that the Code could be effectively implemented. The establishment of an international criminal jurisdiction entailed a number of difficult problems, such as its demarcation from the jurisdiction of national courts and the determination of the rules that would be applicable to the international criminal court. Other problems related to the determination of penalties and the execution of judgements.

26. An excessively hasty and overly ambitious attempt at drafting would not only be in vain but would also destabilize existing customary international law and could even jeopardize the existing legal structure. The Commission should therefore avoid engaging in the hasty drafting of an international code for the punishment of offenders. The Commission, in the process of codifying the topic, should bear in mind the need to prepare rules that were truly meaningful and would function effectively in the contemporary world, which had seen tremendous changes since the immediate post-war era when the topic had first been considered. It should also bear in mind that the topic had political implications for each country.

27. Many problems remained that required further deliberation. They included the question of whether the same jurisdiction was applicable to all crimes against the peace and security of mankind covered by the Code, and whether the international criminal court should exercise its jurisdiction for all crimes and their perpetrators as defined in the Code. The Commission should also bear in mind that no common view existed among its members on some basic issues, such as what constituted a crime against the peace and security of mankind or the specific types of punishment to be imposed.

28. In conclusion, his delegation hoped that in the course of its deliberations on the draft Code, the Commission would proceed with utmost prudence, without losing sight of the ultimate goals of the international community, which were to define clearly a crime and the criminal responsibility of individuals, to establish a mechanism which would have jurisdiction over the prosecution and punishment of crimes, and lastly, to ensure wide acceptance of such a mechanism by the international community.

29. Ms. THORPE (Trinidad and Tobago), speaking also on behalf of Antigua and Barbuda, Barbados, Grenada, Saint Lucia and Saint Vincent and the Grenadines, said that at the current stage she would confine her comments to the issue of penalties and the two draft provisions related to the creation of an international criminal court, namely the jurisdiction of the court and the requirements for the institution of criminal proceedings.

30. With respect to penalties, there was no one philosophy on the forms of punishment applicable to all offences; however, violation of any of the crimes defined in the draft Code and in international conventions warranted commensurate punishment; hence, there was considerable merit to the first version of draft article Z.

(Ms. Thorpe, Trinidad and Tobago)

31. Trinidad and Tobago had originally proposed that an international criminal court's competence should initially be restricted to crimes that were the subject of international conventions on which there was general agreement, such as genocide, apartheid, certain war crimes and drug trafficking. However, since the crimes elaborated in the draft Code concerned the international community as a whole they should be included in the list of crimes that would be subject to the court's jurisdiction.

32. On the question of the conferment of jurisdiction by States, the principle of territoriality, which was generally accepted, would ensure that the State in whose territory the crime had been committed would confer jurisdiction, but it would not deny the right of other States to seek to have the crime adjudicated before their own courts. Paragraph 3 of the possible draft provision on the jurisdiction of the court (A/46/10, footnote 300), whereby the court would have cognizance of any challenge to its own jurisdiction, was satisfactory. As suggested in paragraph 4 of the possible draft provision, the court should be empowered to rule on any dispute concerning judicial competence that might arise between two or more States, provided that such jurisdiction had been conferred on it by the States concerned. Paragraph 5 of the proposal could lead to the development and codification of international criminal law through the court's interpretation of many problematic principles and concepts, such as non bis in idem. The statute of the court would have to state whether its interpretation would be binding or optional. The General Assembly, the Security Council and other United Nations organs should have the right to request an interpretation of a provision of international criminal law.

33. With respect to the nature or extent of the court's jurisdiction, some States had expressed reservations as to the principle of exclusive jurisdiction, which would mean that States would have to cede their criminal jurisdiction with respect to those crimes which would come under the jurisdiction of the court. As the issue was complex, the Commission should consider the advantages and drawbacks of exclusive jurisdiction and provide possible solutions.

34. A second option was concurrent jurisdiction with domestic courts, States being free to decide to which court a given case should be referred. States that had serious reservations concerning exclusive jurisdiction might see that proposal as a workable compromise, since their sovereignty in judicial matters would not be threatened.

35. An international criminal court should be used to provide States with a third alternative to trial by domestic courts and extradition. Consideration could be given to creating a review mechanism within the court itself and also empowering it to present advisory opinions when requested by States.

36. It had been suggested that the court could consider the nature of the crime in determining the extent of its jurisdiction, crimes listed in the Code

(Ms. Thorpe, Trinidad and Tobago)

being divided into two main categories, those under exclusive jurisdiction and those under concurrent jurisdiction. It would be difficult to reach a consensus on such a categorization, and the uncertainty would not facilitate the development of the court as an international judicial institution.

37. With respect to the conferment of jurisdiction, she considered that in order to safeguard a State's sovereignty there should be a specific declaration by that State of its intention to recognize the court's jurisdiction, under something like the formula in the Statute of the International Court of Justice.

38. In his second draft provision, on criminal proceedings (A/46/10, footnote 301), the Special Rapporteur had proposed that such proceedings should be instituted by States, except that the existence of acts or threats of aggression would first have to be determined by the Security Council. However, the Security Council, whose role was by and large a political one, might block certain criminal proceedings for purely political reasons. Further consideration of the matter was therefore advisable, as the yardsticks used to measure international crimes such as aggression varied, the Security Council employing political considerations while the court would use legal reasoning.

39. Some delegations feared that a State's judicial sovereignty would be undermined by the establishment of an international criminal court, especially if the latter were endorsed with exclusive jurisdiction, but international crimes by their very nature were so great and so offensive to the conscience of mankind that there must be recourse to an international body. International criminals were no respecters of borders, national security of States or domestic legal systems. Hence, the only viable and impartial alternative to domestic procedures and extradition was an international mechanism. The Commission should therefore be mandated to prepare a draft statute of an international criminal court, to be discussed during its forty-fourth session, for a permanent tribunal to deal with international crimes would advance the international rule of law and the establishment of such a court during the United Nations Decade of International Law would be a worthwhile achievement. It could play a valuable role in reducing incidents of international and transnational criminality and contribute to the codification of international criminal law.

40. Mr. Sandoval (Ecuador), Vice-Chairman, took the Chair.

41. Ms. LI Yanduan (China) said that the codification and progressive development of international criminal law would help to prevent and punish crimes against the peace and security of mankind. Her comments would be confined to the questions of the possible inclusion of penalties in the Code and of the international criminal jurisdiction.

(Ms. Li Yanduan, China)

42. The draft Code should provide for penalties, as that would only be in keeping with the principle nulla poena sine lege but would also help to avoid the substantial differences resulting from the diversity of national penal systems. However, since different penalties might be prescribed for the same crime under the internal law of the various countries any uniform regime of penalties that might be included in the draft Code might have difficulty in winning general acceptance. In considering the penalty provisions, the Commission would thus be well advised to bear in mind the extent to which States might be willing to compromise in that regard.

43. Some members of the Commission had suggested that maximum and minimum penalties should be set in the draft articles. In considering that question, the different judicial systems of the countries of the world must be taken into account, perhaps by the insertion of a general principle stipulating that the penalties for crimes against the peace or security of mankind should be proportionate to the seriousness of the crimes, leaving States to decide the actual penalties. That did not have the advantage of applying a uniform regime of penalties, and might also give the judges of a putative international criminal court too much discretion. Great difficulties might thus arise in practice, but even so, her delegation considered it necessary to prescribe specific penalties with respect to each crime.

44. At its latest session, the Commission had discussed the possible draft provision on the establishment of an international criminal court submitted by the Special Rapporteur (A/46/10, footnote 300). However, that provision had been intended to stimulate more in-depth discussion and research on the issue, and her delegation was in favour of that approach. It was important not to lose sight of the fundamental reality that the international community was composed of sovereign States, which had always been sensitive to issues pertaining to sovereignty. No State was willing to give up its jurisdiction over criminal issues, for there its judicial sovereignty was at stake. In the light of those considerations, it would be unrealistic to endow the international criminal court with absolute jurisdiction at the current stage. Even if the international community agreed to the establishment of such a court, the consent of States to its jurisdiction should be expressed separately in a treaty, agreement or declaration. Perhaps at the outset the jurisdiction of the court should be limited to the crimes listed in the draft Code or willingly submitted to the court by States.

45. The issue of appeal had not yet been seriously considered by the Commission, but merited study, since from the point of view of criminal law appeal was extremely important. It might be advisable to submit a criminal case to a chamber of the court, an appeal from the judgement of the chamber then being possible before the full court. Some might contend that an international criminal court was a supreme court whose judgement was not subject to appeal. At any rate, her delegation could not agree with the view that the international criminal court should be treated as an appellate court to review judgements delivered by a domestic court.

46. Mr. ROBINSON (Jamaica) said that, although work on the draft Code of Crimes against the Peace and Security of Mankind had begun as early as 1949, significant developments in international affairs had made it difficult to adhere to the Commission's original mandate, which had been primarily a response to the horrific crimes committed during the Second World War. There was accordingly a need to restructure the draft Code, although the articles adopted in first reading represented an important milestone in the Commission's consideration of the topic.

47. Turning to part one of the Special Rapporteur's ninth report (A/CN.4/435 and Add.1 and Corr.1), he said that too much significance had been attached to what was referred to in paragraph 67 of the Commission's report as "the diversity of concepts and philosophies" in international law: what in fact was required was political will and a spirit of accommodation. His delegation did, however, feel that broad agreement could be found in favour of a basic penalty of life imprisonment for the commission of a crime against the peace and security of mankind. It supported the exclusion of the death penalty from the Code, not on moral grounds, but for the simple reason that it would give rise to too much controversy.

48. It was not clear to his delegation how the question arose as to whether penalties should be included in the Code or whether reference should simply be made to the internal law of the States parties to the Code. Jamaica did not see how it was feasible to consider the latter possibility as a viable option. A directive to an international court or tribunal to apply penalties taken from the internal law of States parties would be difficult to follow in the absence of some clarification regarding the governing internal law: did the law of the victim State or that of the State in which the person was found or was being tried apply? It would seem that penalties could be left to the internal law of the States parties to the Code only if trials were to be conducted by domestic courts applying the law of the forum, not by an international court or tribunal. Recourse to domestic courts in such circumstances would be unfortunate in a climate conducive to international cooperative efforts. It would therefore be preferable to establish a single penalty or one set of penalties applicable to all crimes under the Code, rather than to specify separate penalties for each crime.

49. Such an approach was consistent with the conceptual uniformity of the Code, in which all the crimes had the common characteristic of extreme gravity. There should, therefore, be a range of penalties for all the crimes under the Code. In addition to life imprisonment, other penalties, such as a minimum and maximum term of years, could be specified: an international court would be able to select from that set of penalties one which was appropriate for the particular crime.

50. In general terms, his delegation favoured the second version of draft article Z, although it was not clear what was meant by the wording "deprivation of some or all civil and political rights". Many of the rights set out in the International Covenant on Civil and Political Rights had passed

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into customary international law, and the circumstances in which derogation from those rights was permitted, were carefully specified. The Commission should therefore tread cautiously in that matter.

51. His delegation had been delighted to see that the Special Rapporteur had produced a draft article on the jurisdiction of an international criminal court. Although Jamaica accepted that such jurisdiction would at the current stage be confined to individuals, and would not cover States, it wondered whether juridical perons, such as companies, should also be covered. Of course, the individuals who were part of the company would themselves be liable for any act committed on the company's behalf which constituted a breach of the Code. None the less, there were situations where it would be useful to proceed against the company as such, as well as its individual directors or shareholders. In such cases, the articles on penalties should provide for fines and other kinds of sanctions appropriate for a company.

52. Jamaica could not contemplate a court whose jurisdiction would not extend to all the crimes under the Code. Were that approach to be adopted, it would be impossible to determine the status of crimes not falling within the court's jurisdiction. They would already have been declared crimes by and under the Code, but there would be no judicial regime to deal with persons who committed such crimes, apart from national courts. His delegation could see nothing excessively ambitious in giving the court jurisdiction over all crimes under the Code. It was essential to avoid a situation in which crimes not subject to the jurisdiction of the court could be committed with impunity.

53. His delegation favoured a system of exclusive jurisdiction for the court, although it might be interested in a mixed approach whereby an international court would have exclusive jurisdiction over some crimes while domestic courts would have exclusive jurisdiction over others. The notion of giving an international court and domestic courts concurrent jurisdiction over some crimes under the Code was unattractive because of the inevitable conflicts, confusion and complexity to which that could give rise. Current trends towards the voluntary surrender by States of aspects of their sovereignty favoured the establishment of an international criminal court with exclusive jurisdiction over crimes under the Code.

54. It was not clear on what basis the discussion in the Commission on the power of the court to review decisions of national courts had taken place. Nowhere was it stated that only decisions on crimes covered by the Code were involved. It was inconceivable that what was being contemplated was the jurisdiction of an international court over all decisions of national courts, including those relating to crimes not covered by the Code. If what was at issue was national decisions on crimes covered by the Code, it was immediately apparent that that approach could not apply to a situation where the court had exclusive jurisdiction over the crimes under the Code. Presumably, therefore, the discussion referred to in paragraph 116 of the Commission's report proceeded on the assumption that there was some kind of concurrent

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jurisdiction between an international court and national courts over crimes under the Code. His delegation did not support the suggestion that there should be a jurisdiction to review decisions of national courts, since it regarded such a system as neither realistic nor feasible.

55. An international human rights body, such as the Human Rights Committee, did not, in deciding whether a State was in breach of a human right, assess the weight of evidence in a case that came before it from national courts; its primary concern was whether there had been any gross unfairness. Owing to that relatively limited role, an international human rights body was less likely to find disfavour with Governments than an international criminal court whose powers of review over cases from national courts would more than likely cover all aspects of those cases, including issues relating to the weight or sufficiency of evidence.

56. With regard to the question of conferment of jurisdiction, his delegation believed that the draft articles were unnecessarily complicated and confusing. A State which accepted the statute of the international court must be understood to have undertaken an obligation to adopt the necessary legislative and other measures to give the court jurisdiction over crimes under the Code when the crime was alleged to have been committed in its territory or when the perpetrator was one of its nationals, or when it was the victim State or the State whose nationals had been the victims of the crime. The draft article should be reformulated to reflect that approach.

57. His delegation supported the principle that the court must have the power to determine questions relating to its own jurisdiction, but wondered whether it was necessary to incorporate a provision to that effect in the Code, since it reflected a well-established principle. Moreover, paragraph 5 of the possible draft provision on the jurisdiction of the court prepared by the Special Rapporteur was vague to interpret a provision of international criminal law. In his delegation's view, more problems would be raised than would be resolved by giving the court the power to interpret provisions of international criminal law other than those in the Code.

58. In view of the extreme gravity of the crimes under the Code, his delegation would not support a consultative, advisory function for the court.

59. With regard to the question of the institution of criminal proceedings, his delegation considered as useful the proposal that an independent prosecutional body should be established to bring cases to the court. Although that procedure would serve to promote impartiality in the institution of criminal proceedings, his delegation would not insist on it if a consensus could not be reached on the subject.

60. An obvious conflict would arise between the Security Council and an international criminal court if, following a determination by the Council that a particular act constituted aggression, the court were to find otherwise.

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One solution to such a possible conflict was to bind the court to accept a determination made by the Council but to leave the court free to make its own determination as to aggression when no such determination had been made by the Council. In Jamaica's view, it was necessary to devise a system which took account of political realities and at the same time acknowledged the need to maintain the independence, prestige and respectability of the Court. A solution that left the international Court powerless to make a determination in respect of aggression contrary to one previously made by the Council would not be conducive to that end. It would therefore be best to recognize that some issues were not justiciable, and that accordingly the court should not investigate whether an act which had already been the subject of a determination by the Council constituted aggression. The court would thus have no jurisdiction to try a case in respect of an act on which the Council had already expressed its views. That approach would eliminate the possibility of conflict between the court and the Security Council in determining whether an act constituted aggression.

61. The provisional adoption of a set of draft articles on the Code as a whole on first reading represented a significant achievement. However, some structural and other changes had been made in the draft articles without the Commission having had the benefit of the Sixth Committee's views. His delegation entertained some doubts as to the usefulness of dividing offenders into three groups and of distinguishing between persons who were leaders or organizers and persons who were not. He queried whether it was appropriate to have restrictive provisions in the Code identifying the kind of individuals capable of committing a crime under the Code: that question might best be settled by means of the development of case-law by an international criminal court.

62. Article 3 was confined to the commission of crimes against the peace and security of mankind by individuals. His delegation believed that such crimes could be committed by States, but it accepted that, at the current stage, it would be better for the Commission to postpone consideration of the international criminal responsibility of States. For that reason, the commentary on article 3 could be regarded as gratuitous, pre-emptive and prejudicial. Complicity under paragraph 2 of the commentary could cover situations where help was given ex post facto in the absence of an agreement prior to the perpetration of the crime, provided that the person giving the help knew that a crime under the Code had been committed. The special circumstances relating to such a person could be taken into account in sentencing.

63. Paragraph 3 broke new ground by defining an attempt to commit a crime under the Code. In his view, such a definition should have the following features: the attempt must be a physical act and not mere intention; it must be a step in the commission of a crime and not simply a preparatory act; and impossibility of performance must not be considered a defence. In his delegation's view, however, the third criterion was redundant in that,

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provided that there was an intention to commit the crime and a step had been taken to carry it out, the impossibility of performance was immaterial. The fourth element identified in the commentary on article 3 was non-completion of the crime for reasons independent of the perpetrator's will; he wondered whether that criterion implied that an attempt had not been made if the perpetrator had had a change of heart. His delegation did not believe that it was absolutely necessary to define the term "attempt", which, in the absence of consensus, might appropriately be left to judicial interpretation and case-law.

64. With regard to article 14, his delegation thought that it would be prudent to identify defences in the Code, which already, in articles 7 and 11 for example, specified circumstances which did not constitute a defence.

65. Turning to part two, he said that his delegation supported the decision to dispense with the distinction between crimes against peace, crimes against humanity and war crimes. It also agreed that the Code should apply not only to those who committed the acts but also to those who ordered others to commit them. It might, however, be queried whether such a provision was in fact necessary, since it could be argued that a person who ordered the commission of a crime under the Code fell into the category of an individual aiding and abetting under article 3, paragraph 2.

66. His delegation supported the compromise approach in article 22, which confined the applicability of the Code to exceptionally serious war crimes. A possible conflict of jurisdiction could, however, arise for a State which was a party to both the Code and the 1949 Geneva Conventions and the Additional Protocols thereto, in that the domestic courts of those States parties could have jurisdiction over grave breaches which might also be amenable to the jurisdiction of an international criminal court as an exceptionally serious war crime under the terms of the Code.

67. Article 26, which made wilful and severe damage to the environment a criminal offence, was particularly timely in view of the forthcoming United Nations Conference on Environment and Development. The conflict between the subjective requirement of wilfulness in that article and the apparently objective criterion of expectation in article 22 should be resolved by incorporating the latter criterion in article 26.

68. Mr. MANGUEIRA (Angola) said that the draft Code of Crimes against the Peace and Security of Mankind dealt with two fundamental issues whose solution would determine its fate: penalties, and the establishment of an international criminal court.

69. Having examined the issue of penalties in detail, his delegation did not understand how penalties could be set out in the draft Code, thus apparently ignoring the jurisdiction and sovereignty of national courts. On the one hand, there appeared to be an indirect attempt, under cover of the differences

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between national legal systems, to give special treatment to a criminal whose actions were by definition more serious than those of common criminals. Similarly, at the domestic level a judge's individual interpretation in respect of a case could lead to the imposition of penalties that differed from those imposed in connection with similar cases. On the other hand, there was the problem of limiting or superseding the sovereign jurisdiction of a given State's courts over the criminal acts in question, with respect not only to that State's own citizens but also to foreigners.

70. His delegation thought that the Code should not place too much emphasis on specifying penalties for each crime; instead, it should focus on defining the crimes in question and on establishing an international mechanism for cooperation in combating the crimes. In approving the Code, each State would ipso facto recognize the crimes in its internal legal provisions and must take appropriate steps to harmonize the two sets of provisions, duly observing fundamental human rights. He wished to stress that he was not disregarding the principle of nulla poena sine lege in that connection. His delegation supported the view that penalties for crimes defined in the future Code should be determined by the competent court, taking account of the seriousness of the crime, that domestic legislation must take account of the fundamental human rights laid down in the International Covenants on Human Rights, and that that the Commission should seek a more rational form of inter-State cooperation in the area in question.

71. Angola believed that perpetrators of crimes should make reparation for the damage caused by their acts, and that confiscated property should not be entrusted to humanitarian organizations, as suggested in paragraph 76 of the Commission's report, but should be returned to its rightful owner.

72. His delegation wondered how an international criminal court could have jurisdiction over crimes against the peace and security of mankind without encroaching on the jurisdiction of national courts. International machinery already existed to help settle conflicts between laws in civil matters through international arbitration, while protecting the jurisdiction of each court. His delegation thought a similar system could be established for the crimes listed in the Code, but considered that more study of the idea was required.

73. Prosecution in national courts called for considerable resources, particularly financial resources, and the cost was often prohibitive for developing countries; the proposed international criminal court would also be costly, and the cost would logically be borne by States. In the current serious international financial crisis, States were far more interested in solving their economic and social development problems than in creating a costly international structure such as the one under discussion in the Sixth Committee. Perhaps the existing structure of the International Court of Justice could be made use of in that context, if its Statute were altered and its mandate broadened. His delegation would not reject an international court, but would want it to be truly international or interregional in

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character and to consider the interests of all States involved, as had happened in the case of the Nürnberg and Tokyo trials.

74. With respect to the institution of criminal proceedings, his delegation thought that individuals, and not just States, should have the right to institute such proceedings.

75. His delegation's specific proposals were as follows: in article 1, the square brackets should be removed. Article 2 should be improved so that internal law and international law could be clearly harmonized. Article 3 should mention the responsibility of organizations involved in the crimes in question. In paragraph 2 of that article, the word "directly" should be deleted so as to make the provision more general. In article 5, the wording should reflect the fact that responsibility was linked to liability for reparation. Paragraphs 1 and 2 of article 9 should be combined, and the expression "an international criminal court" should be replaced by "a competent court". The content of article 13 was very debatable, in view of the practice of some States that showed little respect for the principle of jus cogens.

76. Lastly, his delegation believed that incitement, including propaganda, should also be mentioned in draft articles 16, 19, 20 and 23, as it often preceded the commission of the crimes concerned.

77. Mr. MANSOUR (Tunisia) said that the draft Code of Crimes against the Peace and Security of Mankind, even in its current preliminary form, was a valuable reference document that would enable States to establish facts and collect evidence so as to punish such crimes. The Code must be developed in strict conformity with the principles of criminal law, both in its preventive and its punitive aspect. Therefore, it must provide penalties for the crimes it listed. Accordingly, his delegation welcomed the Special Rapporteur's draft article Z, which, although not perfect, would provoke debate and thus enable the Special Rapporteur to set a future direction for his inquiries. However, the article was a little vague and left too much discretion to each court in determining the exact penalty, so that it might encounter procedural and ethical problems in various States, which could be forced to modify their penal code.

78. A viable and lasting international order could not exist without the objectivity and impartiality of an international criminal court, which his delegation considered more and more feasible in the changing context of international relations and in view of the spread of international organized crime. Although it inspired reluctance among some States, jealous of their national sovereignty and of the jurisdiction of their national courts, it could further advance international law and ensure uniform punishment of the most serious crimes. His delegation thought that such a court should have jurisdiction only over the crimes defined in the Code, even though that must delay its establishment until the draft articles were finalized.

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79. With respect to the institution of criminal proceedings before the court, his delegation thought that in view of the seriousness of the crimes within its jurisdiction, the court could be seized of a case by any one of the States parties to its statute. The court should be permanent and be made up of judges representing the chief legal systems of the world, and should be given the status of a United Nations organ through an amendment to the Charter.

80. Mr. ATTARD (Malta) said that it had been suggested in recent years that international law could not await progress by the Commission, which proceeded at a slow pace, and its rigorous deliberations were regarded by some as procrastination. The Commission had indeed been considering the question of a draft Code against the Peace and Security of Mankind since 1949, but the answer to such criticism lay in achieving a balance between the demands of States for speedy development of legal regimes and the need for stability and accountability of such regimes. Over the past five years the Commission had done much to achieve that balance. Haste could lead to texts lacking general support which would weaken instead of strengthening international law.

81. At its forty-third session the Commission had concluded consideration of the topic of jurisdictional immunities of States and their property and had provisionally adopted draft articles on the draft Code and on the law of the non-navigational uses of international watercourses. Those achievements, coupled with the submission in 1989 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier confirmed the Commission's effective contribution to the strengthening of international law. Nevertheless, the Commission's working methods should be revised in order to avoid unnecessary delay between the introduction of a new topic and the final result. The Commission's intention to devote considerable attention to its working methods at its next session was therefore welcome.

82. The final 22 draft articles on jurisdictional immunities of States and their property accurately reflected the current law on the topic, which urgently needed codification. His delegation therefore supported the recommendation to convene an international conference of plenipotentiaries to consider the draft articles and to conclude a convention on the subject. Consideration should also be given to the creation of a legal mechanism for the settlement of disputes. Article 16, concerning ships owned or operated by a State, was welcome since it complemented the provisions of other legal instruments. However, the question of State-owned or State-operated aircraft engaged in commercial service had not been given adequate attention. A more cautious approach should be taken in article 22, particularly in respect of the procedural immunities provided for in paragraph 2; several legal systems required the plaintiff to make a payment for judicial costs, and waiving such an obligation might give a State an undue advantage.

83. Turning to the draft articles on the draft Code of Crimes against the Peace and Security of Mankind, he said that his Government intended to submit detailed observations before 1993 in accordance with paragraph 174 of the

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Commission's report. It supported in principle the establishment of an international criminal court, but the matter required further consideration. It was certainly better to proceed cautiously in defining the court's jurisdiction ratione materiae, and initially its competence should be limited to crimes on which there was general agreement. The conferment of concurrent jurisdiction presented formidable problems; exclusive jurisdiction was the most straightforward approach but it might not enjoy widespread support. Perhaps the most realistic solution would be to grant jurisdiction to review cases, thus giving the court a useful preventive role and ensuring that national courts observed the fundamental rules of international law. The Commission should also examine further the relationship of the court with the Security Council. Ultimately, the question of conferment of jurisdiction depended on the solution adopted with respect to the extent of the court's jurisdiction.

84. With respect to article 3, paragraph 3, concerning attempt to commit a crime, his delegation agreed with the approach taken in the 1954 draft Code where attempt was admissible for all the crimes covered by the Code. It was doubtful whether any major exceptions could be made in respect of the crimes listed in part II on the ground of their gravity. With regard to article 14, defences and extenuating circumstances should be taken into account in determining a perpetrator's responsibility but the approach should be restrictive.

85. Many of the crimes listed in part II of the draft Code were generally recognized. His country supported in particular the inclusion of wilful and severe damage to the environment in article 26, which should be read in conjunction with draft article 19 on State responsibility, where the term "natural environment" should be used instead of "human environment". His delegation supported the view of some members of the Commission that the term "wilful" should be deleted from article 26, for widespread and severe damage to the environment should be punishable regardless of whether it was caused wilfully.

86. The Maltese delegation also supported the idea that the Commission should include in its programme of work the topic of the legal aspects of the protection of the environment of areas not subject to national jurisdiction, for Malta had taken an initiative in that regard at the forty-third session of the General Assembly. Unless action was taken to protect such areas, the efforts to protect areas falling under national jurisdiction could prove futile. After all, pollution respected no political boundaries. The Commission should consider the relevance of obligations erga omnes to the protection of the "global commons". In resolution 43/53 the General Assembly had recognized that climate change was a common concern of mankind, and the Commission should examine the legal implications of that statement. In paragraph 257 of its report it noted a suggestion, which had in fact often been made by the Government of Malta, that the Trusteeship Council's mandate could be extended to cover the protection of the resources of the "global commons". The Mediterranean Academy of Diplomatic Studies intended to convene a meeting of legal experts in Malta in 1992 to examine that very issue.

87. Mr. SZENASI (Hungary), referring to the topic of jurisdictional immunities of States and their property, said that his delegation endorsed the Commission's recommendation with regard to the convening of an international conference of plenipotentiaries to consider the draft articles and to conclude a convention. While the text had been significantly improved, justified concern remained regarding its consistency and inherent legal logic. However, the remaining ambiguities might well be resolved in the course of the conference.

88. Given the complexity of the issue and the delicate balance which should be maintained in both the interpretation and application of the future convention, his delegation shared the view that an appropriate legal mechanism for the settlement of disputes should be included in the proposed convention.

89. Turning to the topic of the law of the non-navigational uses of international watercourses, he said that his delegation noted with satisfaction that the Commission had successfully concluded its first reading of a complete set of draft articles.

90. Hungary, which was situated in the middle section of the Danube, one of the largest and most polluted international watercourses in Europe, possessed the largest drinking water reserves in the form of groundwater in Central Europe. It therefore welcomed the inclusion of groundwater in the definition of a watercourse system.

91. He agreed with the delegation of the United Kingdom on the difficulties that lay ahead in determining the extent of obligations to be assumed by States in respect of watercourse systems which included groundwater of whose extent the State concerned might not be fully aware. He hoped that the Commission would find an appropriate solution when it returned to that issue.

92. His delegation was also pleased to note that the Commission had concluded and provisionally adopted on first reading a complete set of articles on the draft Code of Crimes against the Peace and Security of Mankind. In their current form, the draft articles deserved thorough scrutiny.

93. It was also gratifying that some conceptual points seemed to have been clarified as a result of the Commission's deliberations on the topic of international liability for injurious consequences arising out of acts not prohibited by international law. However, it was regrettable that owing to lack of time the Commission had been unable to enter into substantive discussion of the topic of State responsibility.

94. Referring, in conclusion, to the Commission's long-term programme of work, he said that new topics should be included in the Commission's agenda only if work on existing priority topics on which substantial progress had already been achieved or might reasonably be expected had already been completed, and if the proposed items were of pressing concern to the international community.

95. Mr. PIZA-ROCAFORT (Costa Rica) said that he wished to make some preliminary comments on the draft Code of Crimes against the Peace and Security of Mankind without prejudging the official position which his Government would ultimately take. During the 40 years of the consideration of the item doubts had been raised as to the need for and feasibility of the draft Code, either because the crimes in question were already covered by peremptory norms of international law, by rules of general international law or by rules established in international agreements, or simply because international crimes did not exist. However, in the light of such developments as the establishment by the Nürnburg Tribunal of the international responsibility of individuals for crimes under international law, it could not be maintained that international crimes did not exist. And the draft Code was needed for the purposes of progress and certainty as to the law: progress in the incorporation of other fundamental areas, and certainty in guaranteeing due process and safeguarding the principles of human rights on which contemporary criminal law was based. The last point was of vital importance with respect to the draft Code.

96. The function of law was not so much to punish crimes as to prevent them, and penalties should be viewed only as means of preventing future violations of the law. International law needed criminal penalties when the gravity of the crimes rendered its other mechanisms inadequate as in the case of State responsibility, or disproportionate as in the case of the use of force. International criminal penalties were also needed when agents of a State or even individuals could feel themselves unpunishable under domestic law.

97. The draft Code must include only crimes which seriously violated the fundamental legal values of the international community: peace, human rights, humanitarian law in armed conflicts, the independence and sovereignty of nations, the right of peoples to self-determination, environmental protection, health, etc. The draft Code sought to protect those values by defining such crimes as aggression and mass violations of human rights, but it was first necessary to ascertain whether international criminal law was the most suitable mechanism for that purpose and whether the envisaged crimes and penalties were disproportionate to the objective. The draft Code did indeed seem to meet the requirements in question, and no delegation had argued that the acts defined in the Code should not be condemned. In that connection the criterion should not be the link with a State but rather the seriousness or scope and systematic nature of the crime. Where State responsibility was concerned, there must clearly be a link between the action or omission of a State agent or organ and the alleged damage. But that did not apply when the responsibility was imputed directly to the perpetrator or his accomplices. Nevertheless, some of the crimes included in the draft Code did require a link between the perpetrator and the government apparatus, as in the case of aggression, alien domination or intervention, or apartheid. No such link was required in the case of genocide, systematic or mass violations of human rights, war crimes, international terrorism, drug trafficking or wilful and severe damage to the environment. Accordingly, the international criminal jurisdiction should be used only for the most serious crimes, when domestic

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prosecution was impossible or insufficient. Each crime must therefore be carefully defined, for a great increase in new international crimes would not benefit international law.

98. Turning to the specific articles of the draft Code, he said that the Commission was right not to distinguish between crimes against the peace and crimes against the security of mankind, for discussion of doctrinal differences on that point would bring no benefit and only delay approval of the Code. Some term such as "knowingly" or "intentionally" should be added in the first line of paragraph 2 of article 3 in order to avoid the prosecution of individuals who aided or abetted a crime unknowingly or unintentionally. The point could also be dealt with by inclusion in the draft Code of a general concept of criminal intent. The point was not so important with respect to conspiracy, for conspiracy presupposed intent.

99. The idea of article 4 was correct but the wording should be improved by making it clear that the crimes covered by the Code could not be deemed political or politically related crimes. Otherwise some interpretations might prevent the extradition or trial of persons subject to the jurisdiction of a State. It should perhaps be added in article 5 that the international responsibility of States might be reduced by domestic prosecution of international crimes. And article 6, paragraph 1, would be made clearer by addition of the following sentence: "If extradition is refused, the requested State shall try the alleged perpetrator as if the act had been committed under the jurisdiction of that State". That point could be inferred from paragraph 1 but it must be stated clearly in order to avoid failure to prosecute due to differences of interpretation or to rules prohibiting extradition. His delegation endorsed the purpose of article 7 but pointed out that legal disputes had arisen on the point because the laws of some countries provided statutory limitations.

100. The first sentence of article 8 should make a formal reference to the minimum guarantees of "due process" due to all human beings, and the end of the sentence should read "the evaluation of the facts and of points of law". In article 8, or elsewhere, there should also be a reference to the presumption of innocence and proof of guilt as principles of trial procedure and to guilt as a principle of criminal conviction. There would then be no need to refer, in the case of each crime, to intent, guilt or premeditation as necessary elements for conviction.

101. The list of legal guarantees must include references to, at least, the right of appeal and compensation for judicial error, for those two guarantees were included in article 14 of the International Covenant on Civil and Political Rights. It might also be useful to include a subparagraph establishing the right to other legal guarantees in accordance with "the general principles of law recognized by civilized nations", to use the words of article 38, paragraph 1 (c), of the Statute of the International Court of Justice. The scope of the code and the severity of its penalties should be

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matched by the strongest possible legal guarantees and by a system to ensure application of the principles of res judicata and non bis in idem. Without such guarantees and without an international criminal court, the exceptions to the principle of non bis in idem contained in article 9 seemed excessively broad.

102. Article 10, paragraph 2, should be rethought, for such a broad exception would undermine one of the main virtues of the draft Code - the guarantee of certainty as to the law and of the principle of nullum crimen sine lege. It might be useful to include words to the effect that on the entry into force of the Code, no one should be convicted of an international crime in the States in which it was applicable except in respect of the acts which the Code or other international agreements expressly defined as punishable.

103. Article 14 should perhaps define the effects of defences and extenuating circumstances by stating, for example, that the court could reduce the minimum penalty in the light of such circumstances. If sentences could not be thus reduced, the court might find it very difficult to decide whether to convict.

104. His delegation agreed with the Commission that the crimes listed in part II of the draft Code were essentially international crimes. However, some of the definitions of the crimes could be improved. For example, article 15, paragraph 3, should envisage the possibility of the application of collective sanctions in accordance with the Charter of the United Nations or other international or regional agreements, provided that the application of such agreements was limited to the jurisdictions of the States parties thereto. Paragraph 5 of the article, on determination as to the existence of an act of aggression, was acceptable, but it should be added that the decision of the Security Council did not prejudge the participation or guilt of the persons responsible under the Code.

105. Article 16 dealt not with a mere threat of aggression but with the commission of or order to commit an act of aggression. Commissioning was already covered by article 15, and ordering by article 15 in conjunction with article 3, paragraph 3. Paragraph 1 of article 16 therefore seemed superfluous, and paragraph 2 should be transferred to article 15. Article 16, and indeed articles 15, 17, 18 and 20, required a definition of the concept of "leaders or organizers". There would then be fewer criticisms of those articles.

106. The term "exceptionally serious", correctly used in article 22 to define war crimes, should be included in articles 17 and 18, for colonial or alien intervention or domination were indeed exceptionally serious matters.

107. The title of article 21 should be included in the first part of the text, so that it would read "... the following systematic or mass violations", for otherwise any isolated instance of the listed crimes might be covered by the Code. The same point applied in general to article 22, where the scope of the

(Mr. Piza-Rocafort, Costa Rica)

concepts should be more clearly defined. For example, the establishment of settlers in an occupied territory was to be condemned, but it was not necessarily a crime under article 22, and a distinction must be made between the settlers and the authorities ordering their settlement, but the article referred only to "an individual" who committed or ordered the crime; opinions might also vary as to the meaning of the phrase "use of unlawful weapons" in paragraph 2 (c); and paragraph 2 (e) should include the qualification "disproportionate".

108. The Commission had been right to shorten the text of article 23, concerning mercenaries, for it should deal only with the agents or representatives of States, and not individuals, who joined a mercenary force. Here too, it might be useful to include a reference to "exceptionally serious acts".

109. The qualification "systematic" should be included in article 24 in order to make it clear that the reference was not to ordinary offences. However, he could not understand why criminal responsibility for acts of terrorism was limited to the agents or representatives of a State, for terrorism was often engaged in by persons acting independently of a State. Furthermore, there were certain human values particularly vulnerable to terrorism, which must be respected not only by States but by all individuals or groups. It must also be remembered that, even when committed by individuals, the crimes dealt with in articles 21, 22 and 25 were deemed international crimes. When acting systematically, individual terrorists or groups of terrorists should also fall under the scope of the draft Code. Terrorism had no justification, regardless of the motives of the perpetrators and even if they were seeking the liberation of a people.

110. The scope and content of article 25, concerning illicit traffic in narcotic drugs, seemed appropriate, but a reference should be added in paragraph 3 to the knowledge by the person concerned of the illicit nature of the psychotropic substance, for otherwise criminal responsibility might extend to persons innocently engaged in the manufacture, preparation or sale of such substances. Article 26, concerning the environment, was also generally acceptable, but it was not necessary to await the outcome of the United Nations Conference on Environment and Development before specifying the penalties.

111. With regard to article Z proposed by the Special Rapporteur, the only penalty in the Code should be imprisonment for a minimum of 10 years and a maximum of 35 years, without commutation but with the possibility of reduction in the light of extenuating circumstances. Life imprisonment, confiscation of property, forced labour and, in particular, the death penalty should be excluded. The imposition of community work or the suspension of political or civil rights might be acceptable as part of the sentence. That position was without prejudice to the domestic penalties which might be applicable in individual countries.

AGENDA ITEM 126: PROGRESSIVE DEVELOPMENT OF THE PRINCIPLES AND NORMS OF INTERNATIONAL LAW RELATING TO THE NEW INTERNATIONAL ECONOMIC ORDER (continued)

112. The CHAIRMAN announced that the delegations of Angola, Namibia and Zambia had become sponsors of draft resolution A/C.6/46/L.6.

The meeting rose at 1.05 p.m.